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TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 232

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, PETITIONER,

vs.

EDMUND R. WELLS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 26, 1923

CERTIORARI AND RETURN FILED JULY 19, 1923

(29,427)

(29,427)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 6, 1923

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[fol. 1] UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit

Pleas and proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit begun on the first Monday in November, A. D. 1922, at Fort Worth, Texas, before the Honorable Richard W. Walker, the Honorable Nathan P. Bryan, and the Honorable Alex. C. King, Circuit Judges.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Appellant,

versus

EDMUND R. WELLS et al., Appellees

Be it remembered, That heretofore, to-wit: on the 31st day of May, A. D. 1922, a transcript of the record in the above styled cause, pursuant to an appeal from the District Court of the United States for the Western District of Texas, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 3886, as follows, to-wit:

[fol. 2] CAPTION

Be it remembered, that at a regular term of the United States District Court in and for the Western District of Texas, The Honorable W. R. Smith, United States District Judge, presiding, and holding sessions in the El Paso Division thereof, at El Paso, Texas, which term began on the 3rd day of October, A. D. 1921, and continued in session to and including the 1st day of April, A. D. 1922, there came on to be heard and determined on the 22nd day of March, A. D. 1922, the following cause:

No. 129. In Equity

THE ATCHISON, TOPEKA & SANTA FE RAILWAY, COMPANY, Complainant,

vs.

EDMUND R. WELLS et al., Defendants

[fol. 3] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION

In Equity. No. —

THE ATCHISON, TOPEKA & SANTA FE RAILWAY, COMPANY, Complainant,

vs.

EDMUND R. WELLS et al., Defendants

BILL OF COMPLAINT—Filed Mar. 4, 1922

To the Honorable the Judge of the District Court of the United States for Western District of Texas:

Your complainant, The Atchison, Topeka & Santa Fe Railway Company, brings this, its Bill of Complaint, against Edmund R. Wells, a resident of El Paso county, state of Texas, Claude B. Hudspeth, a resident of El Paso county, state of Texas, George E. Wallace, a resident of El Paso county, state of Texas, A. J. Harper, a resident of El Paso county, Texas, Tom Lea, a resident of El Paso county, Texas, J. G. McGrady, a resident of El Paso county, Texas, R. E. Thomason, a resident of El Paso county, Texas, and E. T. Edwards, a resident of El Paso county, Texas, and thereupon complains and respectfully represents and alleges as follows:

First. Complainant is a corporation, organized and existing under and by virtue of the laws of the state of Kansas, and a citizen [fol. 4] thereof, with its principal office and place of business in the city of Topeka, in said state.

Second. That the defendants, Edmund R. Wells, Claude B. Hudspeth, George E. Wallace, A. J. Harper, Tom Lea, J. G. McGrady, R. E. Thomason and E. T. Edwards, are residents and citizens of El Paso county, state of Texas, and of the Western District thereof, El Paso Division, and herein complainant avers that this suit is a suit or controversy between citizens of different states.

Third. That this is a suit or controversy arising under the constitution of the United States, and the amount involved exceeds the sum or value, exclusive of interest and costs, of three thousand dollars ($3,000), and if the acts and things herein complained of be not enjoined, a loss greatly in excess of the above amount, as hereinafter shown, will be entailed on complainant.

Fourth. Complainant is now, and for a number of years has been, engaged in the operation of lines of railway in the states of Illinois, Iowa, Missouri, Kansas, Nebraska, Oklahoma, Colorado, New Mexico, Arizona, California and Nevada, and as such is and has been a common carrier of freights and passengers for hire in all of said states; that it does not own any line of railway in the state of Texas, and that it does not operate any line of railway in the state of Texas, nor is it now engaged in its business as a common carrier of passengers and freight for hire in the state of Texas, and that it does not operate any line of railway in the state of Texas nor in El Paso county, in said state, nor has it conducted any business as a common carrier of [fol. 5] passengers and freight for hire in the state of Texas, nor operated any line of railway therein since the first day of April, 1914.

Fifth. Complainant alleges that on or about the 7th day of October, 1921, Edmund R. Wells, then a resident and citizen of the state of Colorado, by and through the defendants, Claude B. Hudspeth, George E. Wallace and A. J. Harper, under the firm name of Hudspeth, Wallace & Harper, and Tom Lea, J. G. McGrady, R. E. Thomason and E. T. Edwards, under the firm name of Lea, McGrady, Thomason & Edwards, instituted suit in the District Court of El Paso County, Texas, Sixty-fifth Judicial District, against your complainant, same being numbered 21,135 on the docket thereof, for damages on account of personal injuries alleged to have been sustained by him, the said Edmund R. Wells, while in the employ of your complainant as a special officer; that at the time of filing the said petition, the plaintiff, through one of his attorneys, made affidavit, as authorized by law, that the defendant, Atchison, Topeka & Santa Fe Railway Company, was a corporation and non-resident of the state of Texas. Whereupon, notice to serve a non-resident was by the clerk of said court duly issued, attaching thereto a certified copy of plaintiff's petition in said cause, and same was, under date of October 12, 1921, delivered to E. L. Copeland, secretary and treasurer of complainant, at his office in Topeka, Kansas; and said plaintiff likewise caused a citation by publication to issue, as authorized by the laws of the state of Texas, and same was duly [fol. 6] published in a newspaper called the "Labor Advocate", said citation by publication appearing therein on the dates of October 14, October 21 and October 28, 1921; that in the notice to serve non-resident, hereinabove referred to, as well as in the citation by publication hereinbefore referred to, the defendant, Atchison, Topeka & Santa Fe Railway Company, was cited to appear on the first Monday in November, 1921, same being the 7th day of November, 1921, in the District Court of El Paso County, Texas, Sixty-fifth Judicial District, to answer in the said cause of Edmund R. Wells against the Atchison, Topeka & Santa Fe Railway Company. It was alleged in plaintiff's petition filed in said cause that the said plaintiff, Edmund R. Wells, was a citizen of the state of Colorado; that the defendant, Atchison, Topeka & Santa Fe Railway Company, was a foreign corporation, incorporated under the laws of the state of Kansas, and a citizen of said state, and for cause of action therein,

plaintiff averred in said petition that while employed by the defendant as a special officer and while engaged in the duties incident to his employment at San Marcial, New Mexico, and on, to-wit, the 25th day of March, 1921, he met with an accident and was seriously injured, said injuries consisting of a broken knee and knee cap, a strained leg and injuries to the bones and ligaments thereof. It was averred that in stepping from one of defendant's moving trains to the platform maintained at San Marcial and while in the exercise of due care for his own safety, he stepped into a hole or depression in the platform and was thrown or caused to fall in such a manner as to [fol. 7] receive the injuries herein above averred; that it was the duty of the railway company to keep said platform in a reasonably safe and suitable manner so that passengers might mount and dismount passenger trains without the danger of injury, and for the injuries complained of, the said Wells sought recovery in the sum of fifteen thousand dollars. A copy of the petition filed by him in said cause is hereto attached, made a part hereof and marked "Exhibit A" for identification.

Sixth. There is a statute in the state of Texas, same being chapter twenty-one, passed by the Thirty-third Legislature at its first called session and now known as article 247a, Revised Statutes, which reads as follows:

Attachments—Amending Chapter 1, Title 11, Revised Civil Statutes, 1911, Relating Thereto

H. B. No. 57. Chapter 21

An Act to amend Chapter one, Title eleven of the Revised Civil Statutes of this State, of 1911, relating to attachments, by adding thereto Art. 247a, providing for the issuance of attachments in suits against persons, co-partnerships, associations, or corporations upon whom personal service cannot be obtained within this State, founded in tort and upon unliquidated demands and providing for the fixing of the amount of bond in such cases and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. That Chapter one of Title eleven of the Revised Civil [fol. 8] Statutes of this State, adopted in the year A. D., 1911, relating to attachments, be and the same is hereby amended by adding thereto Article 247a as follows:

Art. 247a. Provided that nothing in this chapter shall prevent the issuance of attachments in suits against persons, co-partnerships, associations or corporations upon whom personal service cannot be obtained within this State, founded in tort or upon demands which are unliquidated; but where the demand is unliquidated the amount of the bond to be made by the plaintiff shall be fixed by the judge or clerk of the court or by the justice of the peace issuing the attach-

ment and the bond shall be made in the sum so fixed and upon the approval and filing of same the attachment shall issue as in other cases.

Sec. 2. The near approach of the close of this called session of the Legislature and the fact that our laws do not now provide for the issuance of attachments upon unliquidated demands creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended and this Act take effect and be in force from and after its passage and it is so enacted.

(NOTE.—H. B. No. 57 was passed by the House by a two-thirds [fol. 9] vote: yeas 101, nays 3; and was passed by the Senate by a two-thirds vote: yeas 28, nays 0.)

Received in the Executive Office August 19, 1913, and filed in the Department of State August 20, 1913, without the approval of the Governor.

Became a law August 20, 1913.

And in pursuance of the authority therein sought to be conferred, the said plaintiff, Edmund R. Wells, in the above styled cause, by attorney, made affidavit cotemporaneous with the filing of said suit, to the effect that the same was a suit against a foreign corporation; that personal service could not be obtained within this state; that the action was founded upon a demand which was unliquidated, and gave bond in the sum of thirty one thousand dollars ($31,000), which had been fixed by the judge of said court, as well as by the clerk thereof, and which said bond was by said judge and said clerk duly approved; whereupon a writ of attachment was on said 7th day of October, 1921, duly issued by the clerk of said court, wherein and whereby the sheriff or any constable of El Paso county, Texas, was commanded to attach forthwith so much of the property of the Atchison, Topeka & Santa Fe Railway Company, if to be found in said county, as should be of value sufficient to make the sum of fifteen thousand dollars ($15,000), and the probable costs of suit, to satisfy the demand of the said Edmund R. Wells, plaintiff in said action, which said writ of attachment was, on said date, placed in the hands of the sheriff of El Paso county, Texas, and was by him [fol. 10] duly returned on said date, not executed, for the reason that no property subject to attachment belonging to the Atchison, Topeka & Santa Fe Railway Company could be found in El Paso county, Texas.

That thereafter, and on said October 7, 1921, said Edmund R. Wells, by and through one of his attorneys, made affidavit to the effect that an original attachment had been issued in said cause and that he believed that the Rio Grande, El Paso & Santa Fe Railroad Company, a corporation, doing business in El Paso county, Texas, was indebted to the defendant, The Atchison, Topeka & Santa Fe Railway Company; whereupon he prayed that a writ of garnishment issue and summons the said Rio Grande, El Paso & Santa Fe Railroad Company as garnishee in said cause. A copy of said affi-

davit for writ of garnishment is attached hereto, made a part hereof, and marked "Exhibit B" for identification.

That thereupon, and on said 7th day of October, 1921, and based upon the affidavit and bond for attachment hereinabove referred to and on said affidavit for garnishment hereinabove referred to, said plaintiff caused a writ of garnishment to issue to the Rio Grande, El Paso & Santa Fe Railroad Company, a corporation, doing business in El Paso county, Texas, commanding it to appear and answer in said court on the 7th day of November, 1921, what, if anything, it was indebted to said The Atchison, Topeka & Santa Fe Railway Company, and was when said writ was served upon it, what effects, if any, of said The Atchison, Topeka & Santa Fe Railway Company it had in its possession and had when said writ was served, and [fol. 11] what other persons, if any, within its knowledge were indebted to said The Atchison, Topeka & Santa Fe Railway Company, which said writ of garnishment was duly served on the said Rio Grande, El Paso & Santa Fe Railroad Company on October 7, 1922; that said garnishment suit was docketed in said District Court of El Paso County, Texas, and styled "Edmund R. Wells, plaintiff, vs. Rio Grande, El Paso & Santa Fe Railroad Company, garnishee" and same was numbered 21,137 on the docket of said court.

Seventh. That in pursuance of said writ of garnishment so served upon it, the garnishee therein, Rio Grande, El Paso & Santa Fe Railroad Company, duly and within the time required by law, answered said writ, a copy of the answer so filed by said garnishee being attached hereto, made a part hereof, and marked "Exhibit C" for identification.

Eighth. That the defendant, The Atchison, Topeka & Santa Fe Railway Company, complainant herein, did not appear at the November term of said District Court of El Paso County, Texas, nor on November 7, 1921, as cited, and did not, in any way, manner or form, enter its appearance or subject itself to the jurisdiction of said District Court of El Paso County, Texas, in said cause of Edmund R. Wells against it, and did no act or thing indicating that it had in any way been properly cited to appear and answer in said suit and cause, or that it was subject to the jurisdiction of the District Court of El Paso County, Texas, in said cause; nor has it ever entered such appearance nor in any way subjected itself to the jurisdiction of said [fol. 12] court in said cause; that because of the failure and refusal of said defendant, The Atchison, Topeka & Santa Fe Railway Company, complainant herein, to so appear, the court, on the 8th day of November, 1921, in pursuance to article 1941 of the Revised Statutes of the State of Texas, which reads as follows:

Art. 1941. (1346.) (1212, 1345.) Procedure in Case of Service by Publication Where no Answer, etc.—Where service of process has been made by publication, and no answer has been filed nor appearance entered within the time prescribed by law, the court shall appoint an attorney to defend the suit in behalf of the defendant, and judgment shall be rendered as in other cases; but, in every such

case, a statement of the evidence approved and signed by the judge, shall be filed with the papers of the cause as part of the record thereof. The court shall allow such attorney a reasonable compensation for his services, to be taxed as part of the costs of the suit;

appointed E. F. Cameron and Robert T. Neill, attorneys, to defend the said suit in behalf of the defendant; that the appointment of said attorneys was never at any time authorized or ratified by the defendant, complainant herein, and the judgment was, in fact and in law, a judgment without appearance by or in behalf of your complainant.

Ninth. That the plaintiff in said action, Edmund R. Wells, [fol. 13] acting by and through his attorneys of record, the other defendants herein, secured and took judgment by default in said cause against your complainant on December 21, 1921, for the sum of four thousand dollars ($4,000), which said judgment is now a pretended demand against your complainant in all of its terms and conditions. A copy of said judgment is hereto attached, made a part hereof, and marked "Exhibit D" for identification, and demand has been made by the defendants herein for the payment of same and your complainant is informed and advised and so alleges that an effort will be made to enforce the payment of said judgment, written notice to that effect having been served upon attorneys for complainant herein by the said defendants. And complainant is informed and believes and so alleges that unless restrained, defendants will endeavor to collect the amount of said judgment from your complainant and apply the proceeds of such collection to the payment and satisfaction of the judgment so entered in the above described and entitled cause and as is more fully explained herein hereafter; that the defendants, Hudspeth, Wallace and Harper, and Lea, McGrady, Thomason and Edwards, as complainant is informed and believes, either jointly or some of them in behalf of all, had and have a written agreement with the said Edmund R. Wells, by the terms of which said Wells assigned and transferred to them, or some of them for the benefit of all, an undivided one-third interest in its said cause of action and in its said judgment, and to that extent, they and each of them are beneficial owners of said purported judgment [fol. 14] of December 21, 1921, hereinabove described.

Tenth. That afterwards, and on to-wit, January 24, 1922 judgment was entered in the cause of Edmund R. Wells vs. Rio Grande, El Paso & Santa Fe Railroad Company, garnishee, hereinabove described, by and under which the defenses interposed by said garnishee in its answer to the writ of garnishment served and hereinabove referred to as "Exhibit C," were held for naught, each and all of said defenses being overruled and by and under the terms of the decree so entered therein, said garnishee was held liable to plaintiff to the extent of the amount recovered by plaintiff against defendant, complainant herein, in cause numbered 21,135 a copy of said judgment being hereinabove referred to, and said judgment so entered in the suit against the Rio Grande, El Paso & Santa Fe Railroad Company as garnishee, is now a demand against said garnishee, and like-

wise a demand against your complainant, as and by the terms of said decree so entered in said garnishment suit, the funds necessary to satisfy the pretended judgment entered in the cause of Edmund R. Wells against complainant and in the hands of garnishee are being and will be withheld by said garnishee from your complainant, and it has been and is deprived of the use and benefit thereof, a copy of said last mentioned judgment being attached hereto, marked "Exhibit E" for identification.

Eleventh. That in the case of Atchison, Topeka & Santa Fe Railway Company vs. J. F. Weeks, et al., No. 109 In Equity, pending in this court and in a final decree entered therein on the 24th day of [fol. 15] April, 1920, it was determined that your complainant was not doing business in Texas and was not subject to the process nor to the jurisdiction of any court in Texas in causes of action arising from personal injuries; that the final decree so entered in said cause is still in full force and effect and that the status of complainant has in no particular changed since the entry of said decree and that the accident out of which the suit arose and made basis of this bill of complaint occurred in the state of New Mexico, where the said Edmund R. Wells was then employed, and that no part of same occurred within the state of Texas, nor did complainant at any time promise to settle or litigate the same, or any part thereof, within the state of Texas; that the relation of master and servant, as same is known to the law, existed only between your complainant and the said Edmund R. Wells within the state of New Mexico, and same has never existed within the state of Texas; that before and at the time of the filing of said suit by said Edmund R. Wells in the District Court of El Paso County, the complainant owned and operated, and since then has owned and operated, and now owns and operates lines of railroad extending through a number of counties in the state of New Mexico, including the county of Socorro in which said Edmund R. Wells claims to have been injured on the 25th day of March, 1921, and including the counties in which are situated the town of Las Cruces, Hillsboro, Las Lunas and Albuquerque, and also in the county in which La Junta, Colorado is situated, and in all of which counties, at all times herein mentioned, this complainant was [fol. 16] transacting business and had officers or agents upon whom service of process could have been had and now can be had, and in each of which said counties there then was and now is a court having jurisdiction of the cause of action of said Wells.

Twelfth. Complainant avers that under the laws of the State of Texas as construed by its courts, no special appearance could be entered by it in the said cause filed by the said Edmund R. Wells in the District Court of El Paso County, Texas, for the purpose of testing the service of citation therein, nor for the purpose of questioning the jurisdiction of said court over it for that, under the laws of Texas, an appearance for any purpose would be and will be held a general appearance for all purposes, and would thereby have subjected itself to the jurisdiction of said court for all purposes, and it would have been necessary for it to have gone to the unusual and

unnecessary expense of bringing its witnesses from New Mexico in order to make proper defense therein or to have taken their depositions, and that its defense could not have been properly, fully and intelligently developed by depositions so taken and that to have defended said suit in the District Court of El Paso County would have been a great and unwarranted burden upon and against it and upon interstate commerce; that the order and judgment entered by the District Court of El Paso County, Texas, in the above described cause of Edmund R. Wells against The Atchison, Topeka & Santa Fe Railway and numbered 21,157 on the docket thereof and entered on the 21st day of December, 1921, was without authority of law and [fol. 17] not binding on complainant and void.

Herein complainant avers that it could not have entered an appearance in the said District Court of El Paso County, Texas, for the purpose of moving to set aside said judgment by default for the purpose of testing the amount of damages to which the said Edmund R. Wells might be entitled, or for any purpose whatsoever, without, under the statutes of Texas as construed by its courts, subjecting its person to the jurisdiction of the said District Court of El Paso County, Texas, as under the statutes of the state of Texas as construed by the courts of said state, an appearance by defendant for any purpose in a court of said state, subjects it to the jurisdiction of such court for all purposes.

Thirteenth. That the service of the citations, as hereinabove described, was not service upon your complainant, and same as to it was null and void for the purpose of bringing it within or under the jurisdiction of the District Court of El Paso County, Texas, and that any judgment rendered upon such attempted service would be, is and has been rendered without appearance of the defendant herein, and same is and was violative of the Fourteenth Amendment to the Constitution of the United States and of that part thereof which provides that no state shall make or enforce any law which will abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws, and that the enforce-[fol. 18] ment and attempted enforcement and collection of the judgment so rendered, as above described, would be as to your complainant violative of said Fourteenth Amendment to the Constitution of the United States in that same will deprive it of its property without due process of law and will be a denial to it of the equal protection of the laws, as hereinafter shown and made to appear; that article 1874, of the Revised Statutes of the State of Texas, reading as follows:

"Art. 1874. (1235) (1235) Citation by Publication.—Where any party to the suit, his agent or attorney, shall make oath at the time of instituting the suit, or at any time during its progress, that the party defendant is a nonresident of the state, or that he is absent from the state, or that he is a transient person, or that his residence

is unknown to the affiant, the clerk shall issue a citation for the defendant, addressed to the sheriff or any constable of the county in which the suit is pending. Such citation shall contain a brief statement of the cause of action, and shall command the officer to summon the defendant by making publication of the citation in some newspaper published in his county, if there be any newspaper published therein, but if not, then in any newspaper published in the judicial district where the suit is pending; but if there be no newspaper published in such judicial district, then it shall be published in the nearest district to the district where the suit is pending. Such [fol. 19] citation shall be published once in each week for four consecutive weeks previous to the return day thereof."

and under which said article respondent undertook to obtain service and secure jurisdiction on and over complainant on the cause of action asserted, as well as article 1911 of the Revised Statutes of the State of Texas, hereinabove set out, are, each and both, as to your complainant, on the facts appearing and under which the judgment was entered in said cause of Edmund R. Wells against your complainant, wholly void and unenforcible, and said judgment so entered is and was wholly void and not enforcible because violative of the Fourteenth Amendment to the Constitution of the United States, hereinabove referred to, and that the service of citation on the secretary and treasurer of complainant at Topeka, Kansas, hereinabove described, conferred no jurisdiction upon or over your complainant on the cause of action alleged by the said Edmund R. Wells against it, and the judgment entered thereon is and was null and void because violative of the Fourteenth Amendment to the Constitution of the United States, hereinabove referred to.

Fourteenth. That article 247a of the Revised Statutes of the State of Texas, hereinabove set out, does not confer jurisdiction upon the courts in Texas over foreign railroad corporations on causes of action for personal injuries under the facts hereinabove appearing and the service of the writ of garnishment on the Rio Grande, El Paso & Santa Fe Railroad Company, as hereinabove appears, did not and does not confer jurisdiction upon the courts in Texas over the [fol. 20] defendant, complainant herein, nor did same confer jurisdiction on the court to hear and determine the cause of action declared upon in this, that said original suit of Edmund R. Wells against your complainant was based upon an unliquidated demand for damages for personal injuries, and there is and was no authority in law for the issuance and service of said writ of garnishment, and such issuance and service fixed no lien on any properties of your complainant which could be made the basis of a judgment in rem, and no jurisdiction was thereby conferred upon the District Court of El Paso County, Texas, over complainant on the cause of action declared upon; and in this behalf, complainant avers that article 247a of the Revised Statutes of the State of Texas, by its terms did not authorize the issuance and service of said writ of garnishment, and there is and was no statute of the state of Texas which did authorize the issuance and service of said writ of garnishment. And

herein complainant further avers that any statute of the state of Texas which undertakes to confer such authority and give jurisdiction in causes of action, as hereinabove described, is void, and the attempted enforcement of such statute will and would deprive your complainant of its property without due process of law, and will and would be a denial to your complainant of equal protection of the law, as required under the Fourteenth Amendment to the Constitution of the United States, and because of which, the plaintiff in said action, Edmund R. Wells, is not and was not entitled to receive aid from or by virtue of any statute of the state of Texas.

[fol. 21] Fifteenth. That article 247a of the Revised Statutes of the State of Texas, hereinabove set out, is wholly inapplicable to the facts of the case as declared upon by the plaintiff, Edmund R. Wells, in his original petition, and to construe the same as authorizing the issuance and service of the writ of garnishment, would and will be contrary to the provisions of the Interstate Commerce Act of 1906 as amended, and the Transportation Act of 1920, and the legislature of Texas was and is without power to fix jurisdiction over your complainant on causes of action as declared upon by the said Edmund R. Wells, as well as to fix any lien on and against any funds or property belonging to your complainant and that may be in the possession of a resident of the state of Texas, and to construe said article of the Texas statute as so authorizing would, is and will be contrary to the provisions of the Interstate Commerce Act of 1906 as amended and the Transportation Act of 1920.

Sixteenth. That article 247a of the Revised Statutes of the State of Texas is void because thereunder judicial power is conferred upon the clerk of the court and to apply and enforce the same, as was done in the case of Edmund R. Wells against your complainant, has denied and will deny to your complainant the equal protection of the laws required under the Constitution of the United States, and it is and will be a taking of its property without due process of law.

Seventeenth. That article 247a of the Revised Statutes of the State of Texas, hereinabove set out, is void and wholly unenforcible in this, that additional rights and remedies are therein given against non-[fol. 22] residents of the state of Texas to any that may be asserted against residents of said state; and herein it is averred that there is no statute of the state of Texas which authorizes either the writ of attachment or the writ of garnishment on an unliquidated demand where the defendant resides within the state, and to authorize by law the right to a writ of attachment or a writ of garnishment on an unliquidated demand where the defendant resides out of the state, is and will be a denial to such defendant of the equal protection of the law, and is and will be a taking of such defendant's property without due process of law, and violative of the Fourteenth Amendment to the Constitution of the United States, and same is and will be violative of section 2, article 4, of the Constitution of the United States, which requires that citizens of each state shall be entitled to all the privileges and immunities of citizens in said state.

Wherefore, and for these reasons, said article 247a of the Revised Statutes of the State of Texas, is violative of the Constitution of the United States as applied to your complainant.

Eighteenth. That the issuance and service of the writ of garnishment on the Rio Grande, El Paso & Santa Fe Railroad Company, hereinabove described, conferred no jurisdiction upon the District Court of El Paso County over your complainant, or to hear and determine the cause of action declared upon against it by the said Edmund R. Wells, as the service of said writ of garnishment fixed no lien on the funds or property attempted to be impounded under [fol. 23] said writ of garnishment, as no judgment had been obtained against complainant by the said plaintiff prior to the issuance of said writ of garnishment, and there is no statute of the state of Texas creating, under such circumstances, a lien which may be foreclosed; and herein complainant avers that no valid judgment was ever or could have been obtained against complainant on the cause of action so asserted by the said Edmund R. Wells, and the property of complainant was not legally impounded under the writ of garnishment so issued and served, and same cannot under the laws of the state of Texas, be so impounded or foreclosed prior to the entry of a valid judgment against your complainant. There is no statute in Texas authorizing, under garnishment, judgment in rem against a non-resident to the extent of property impounded.

Nineteenth. Herein complainant avers that the judgment entered in favor of said Edmund R. Wells and against the Rio Grande, El Paso & Santa Fe Railroad Company was void, and same is wholly unenforcible in this, that the District Court of El Paso County, Texas, was without jurisdiction to hear and determine the cause of action asserted against your complainant by said Edmund R. Wells and the judgment entered therein was and is void, as hereinabove made to appear, and without such valid judgment, no judgment could be entered against garnishee in favor of said Edmund R. Wells; that the moneys and property so impounded in said cause under the writ of garnishment were not subject thereto; that plaintiff secured and had no lien thereon which could be foreclosed prior [fol. 24] to the entry of a valid judgment against complainant, and there was no authority in law for the issuance of said writ of garnishment; that the funds belonging to complainant, as well as the cars, engines and other railroad equipment impounded and held by the garnishee under and by virtue of said writ of garnishment, were not subject to seizure thereunder, no lien was or became fixed thereon by reason of said seizure and the garnishee was not liable under the answer filed by it under said writ, as appears therefrom; that the moneys so impounded (reference being here made to the answer of the garnishee) was not subject to the writ of garnishment in that same represented the balances due to your complainant from garnishee as its proportion of the transportation charges due entirely on interstate traffics and all of which accrued to your complainant on interstate business conducted wholly without the state of Texas, and that same is and will be needed by your complainant in the

carrying on of its transportation business wholly beyond the limits of the state of Texas, and which business it is required to conduct by the laws of the United States and orders of the Interstate Commerce, as well as the laws and orders of regulatory bodies in the states through which it operates and transacts its business, and that to withhold the same or any portion thereof under and by virtue of the writ of garnishment so served, as well as the judgment entered in the garnishment proceeding, will be and is violative of the amended act to regulate commerce approved May 29, 1917, as well as the Transportation Act of 1920, and particularly section 402 thereof; that to [fol. 25] perform its service to the public, as by law required, the funds herein impounded are and were needed and same is not subject to the process of garnishment as herein attempted, and no lien became fixed on and against the same by reason of the service of the writ of garnishment and the entry of judgment thereon; that the cars, engines and other railroad equipment set up in the answer of the garnishee (reference thereto being here made) are and were cars, engines and railroad equipment lawfully in the possession of garnishee under contract with your complainant, under and by which said garnishee was entitled to the exclusive use and possession thereof as a common carrier of interstate freights at the time of the service of the writ of garnishment herein, and all such having been delivered to garnishee by your complainant as a connecting carrier of interstate freights, and which would have been returned to complainant in due course of business, and were each and all needed by your complainant when so returned in the conduct of its business as an interstate carrier, and that none of same is and was subject to the writ of garnishment herein served; that to hold the same or subject any of same to the process of garnishment, as herein attempted, would be and is violative of the provisions of the amended Interstate Commerce Act of May 29, 1917, as well as the provisions of the Transportation Act of 1920, and particularly section 402 thereof; that by reason of said acts of Congress and each of same, the equipment so impounded is and was placed beyond the reach of the process of the District Court of El Paso County as herein attempted; that to with- [fol. 26] hold the funds or any portion thereof so impounded under said writ of garnishment, as well as to hold said railroad equipment or any portion thereof under said writ, is without authority of law and void and to subject said moneys and said properties so impounded or any of same under the process of the writ of garnishment, as herein attempted under the provisions of article 247a of the Revised Statutes of the State of Texas, is depriving and will deprive your complainant of its properties without due process of law, and will be a denial to it of the equal protection of the laws, violative of the Fourteenth Amendment to the Constitution of the United States, and will likewise be violative of Section 2, article 4, of the Constitution of the United States; that for these, each and all of said reasons, the judgment so entered in the garnishment proceeding against the Rio Grande, El Paso & Santa Fe Railroad Company is null and void and nonenforcible.

Twentieth. That the Act to regulate Commerce as amended (Paragraph 4, Section 1) makes it the duty of common carriers engaged in the transportation of passengers or property to establish through routes with just and reasonable rates and fares, with reasonable rules and regulations with respect to the operation thereof and with equitable divisions of joint rates and fares between the carriers participating in such through routes; such Act (Paragraph 6, Section 1) makes it the duty of such carriers to establish reasonable practices and regulations for the issuance, form and substance of tickets, receipts and bills of lading, for facilities for transportation, and all [fol. 27] other matters relating to or connected with the receiving, transporting and delivery of property on just and reasonable terms; such Act (Paragraph 10, Section 1) provides that car service shall include the use, control, supply, movement, distribution, exchange, interchange and return of locomotives, cars and other vehicles used in the transportation of property and the supply of trains of any carrier subject to the Act, and makes it the duty of every carrier (Paragraph 11, Section 1) to furnish adequate car service and to establish and observe reasonable rules, regulations and practices with respect to car service; such Act (Paragraph 14, Section 1) authorizes the Interstate Commerce Commission to establish reasonable rules, regulations and practices with respect to car service by carriers and railroads subject to the Act, including the compensation to be paid for the use of any locomotive, car or other vehicle not owned by the carrier using, and empowers the said Commission when of opinion that shortage of equipment, congestion of traffic or other emergency requires immediate action, to suspend the operation of all rules, regulations or practices established with respect to car service and to make just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars and other vehicles; such Act (Section 3) makes it unlawful for any carrier to give any undue or unreasonable preference or advantage to any particular person or locality or any particular description of traffic, or to subject any person or locality or any particular description of traffic to any unreasonable prejudice [fol. 28] or disadvantage in any respect whatsoever; such Act (Paragraph 3, Section 3) makes it the duty of carriers according to their respective powers to afford all reasonable and equal facilities for the interchange of traffic between their respective lines for the receiving, forwarding and delivery of passengers or property to and from their several lines and those connecting therewith; such Act (Section 7) makes it unlawful for any carrier to do any of the acts therein prohibited for the purpose of preventing the carriage of freight from being continuous from the place of shipment to the place of destination; such Act (Section 15) empowers said Commission to enforce the provisions of such Act herein stated; such Act (Paragraph 11, Section 20) requires the initial carrier to issue a bill of lading for freight received and makes it liable for any loss or damage caused by it or its connecting carrier with respect thereto.

That for many years it has been the custom and practice of rail carriers, with exceptions too unimportant to require mention here,

to allow their freight charges to follow the shipments so that the delivering line collects the entire freight charges of all carriers over whose lines the shipments have moved, and the delivering carrier accounts to the other carrier or carriers for its or their proportion of the freight collected. That for many years it has been the custom in order to serve the convenience of passengers for the initial line to sell passenger tickets and coupons good for transportation over connecting lines, to collect from the passenger the entire charge and to account to the connecting line or lines for its or their proportion [fol. 29] thereof. That the garnishee owns and operates a railroad only 20.22 miles long, extending from El Paso, Texas, to the New Mexico-Texas state line, where it connects with the railroad of plaintiff, at which point there is no station and no business reason for the stoppage of trains. That the city of El Paso has a population of 50,000 or more and has a very large commerce originating therein and passing through; that in order to properly serve El Paso and its commerce without subjecting it to any undue prejudice, disadvantage or discrimination and to comply with the provisions of the Act to Regulate Commerce, it is necessary that plaintiff, as it has done in the past, to permit its cars and engines to run over the railroad of garnishee to and from El Paso, to permit garnishee to collect the freight charges for the proportion thereof accruing to plaintiff on freight passing over its line destined to El Paso, to permit the garnishee to sell through tickets good for passage over the railroad of plaintiff, to collect the charge from the passengers and account to plaintiff for its proportion thereof; that such monies due plaintiff by garnishee hereinbefore mentioned were monies so collected by garnishee under such practices for account of plaintiff. That if the statutes of Texas be so construed (as they were applied in said garnishment case) as to authorize the seizure by attachment of cars and engines of plaintiff while in possession of garnishee or to authorize the seizure by writ of garnishment monies due and to become due plaintiff by garnishee herein by collection by garnishee of freight and passenger charges for account of plaintiff under the [fol. 30] practice aforesaid, such statutes so construed will interfere with, impede and obstruct plaintiff in the performance of the duties imposed upon it by the Act to Regulate Commerce and will interfere with and obstruct the Interstate Commerce Commission in the performance of its duties imposed by said Act, or such statutes so construed will deprive plaintiff of its property and rights without due process of law, since it is not due process of law when requiring plaintiff by the Act to Regulate Commerce to permit its cars and engines to run into El Paso and to permit the garnishee to collect its freight and passenger charges, to require plaintiff to submit to the jurisdiction of the state courts at El Paso, Texas, on causes of action of citizens and residents of other states, originating in such other states which have no relation whatever to any traffic or transportation to or from El Paso or to any business or thing therein, and such would be the result if the procedure resorted to and herein complained of should be sustained, and from which it follows that such

statutes when so construed are contrary to the Constitution of the United States and the laws enacted in pursuance thereof

Twenty-first. That article 293 of the Revised Statutes of the State of Texas provides as follows:

"Art. 293. (239.) (205.) Judgment Against the Garnishee When He is Indebted.—Should it appear from the answer of the garnishee, made in either of the modes provided for in this chapter, or should it be otherwise made to appear, as hereinafter provided, [fol. 31] that the garnishee is indebted to the defendant in any amount, or was so indebted when the writ of garnishment was served, the court shall render judgment for the plaintiff against the garnishee, for the amount so admitted or found to be due to the defendant from the garnishee, unless such amount shall exceed the amount of the plaintiff's judgment against the defendant, with interest and costs, in which case it shall be for the amount of such judgment, interest and costs."

And your complainant avers that the garnishee, by reason of the service of said writ of garnishment upon it, and by reason of the rendition of the judgment in said garnishment proceeding, (reference here being made to "Exhibit E"), said garnishee is now withholding and will continue to withhold sufficient of the funds in its possession belonging to your complainant to satisfy the judgment so entered against it, and unless restrained defendants will cause execution to issue against garnishee and thereby attempt to force the payment of the judgment by the garnishee, and will attempt to apply to the extinguishment thereof sufficient of the funds belonging to your complainant and as described in the answer filed in said garnishment proceedings, as will satisfy the demand of the defendants, that your complainant is now deprived of the use and benefit of the funds so withheld, same being greater in amount than the sum of four thousand dollars ($4,000), and unless restrained the defendants herein will apply so much of said funds as may be necessary to the extinguishment of the judgment en- [fol. 32] tered in the case of Edmund R. Wells against your complainant, and whereby complainant will be deprived of the same contrary to the forms of law and violative of its right thereto; that the judgment entered in the garnishment case against the Rio Grande, El Paso & Santa Fe Railroad Company, as per its terms, is now enforcible; that demand has been made for the payment thereof, and the said garnishee will comply with said demand unless the enforcement of said judgment and the judgment entered against your complainant be prevented, and that if the amount thereof is so paid, your complainant will have no recourse at law, as it is informed, advised, believes and so alleges that the said Edmund R. Wells is insolvent and the amount of said judgment so paid to him cannot be recovered and that same will not, in the event the above described judgments are set aside and enjoined, be voluntarily returned by the defendants herein; that to withhold said funds or any portion thereof from this complainant and deprive it of the use and benefit

thereof, will be violative of the constitutional immunities to which it is entitled and violative of the acts of Congress hereinabove referred to.

Twenty-second. Your complainant avers that for many years prior to the entry of the final decree in the cause of your complainant against J. F. Weeks, et al., numbered 109 in Equity in this court and above referred to, it had been the practice or usage of attorneys residing in El Paso county to institute suits against complainant in the said courts of said county for injuries to persons occurring in the states of Illinois, Kansas, Colorado, New Mexico, [fol. 33] Arizona and California, and in cases where the injured parties were residing in such states respectively at the time of such injuries, there having been filed prior to the time your complainant exhibited its bill for injunction in its said cause against J. F. Weeks, et al., above referred to, and for and during the six years immediately preceding the filing of said bill, more than seventy-five suits in the state courts of El Paso county for personal injuries occurring as above alleged and in which many thousands of dollars were involved; that during said period, copies of citations in said causes were usually delivered to parties residing in the county of El Paso, Texas, who were alleged to be officers or agents of your complainant, and complainant was compelled to elect between suffering judgments by default in said causes the harassment, annoyance and expense of resisting execution that might be issued thereon, or to appear in said suits in El Paso County, which rendered it necessary in many instances for its employees to leave their regular work in such states and go to El Paso to testify as well as to incur the expense thereof; that during the absence of such employees on such trips to El Paso, substitutes had to be procured for them in their regular work, which, to a greater or lesser extent, disorganized the business of complainant in such other states, and, to some extent, subjected employees, passengers and property in its custody to greater risk for the reason that the regular men were, to some extent, better qualified to safely perform their services than are substitutes, and in other respects, your complainant was subjected to [fol. 34] undue hardship, expense and inconvenience; that since the entry of the final decree in the said cause of your complainant against J. F. Weeks, et al., above described, no such suits have been filed in the District Courts of El Paso County, Texas, until the institution of the one herein complained of; that there never had been and now is no just, lawful or equitable reason or cause why such suits should not have been instituted and prosecuted in the respective states where the injuries occurred, in each of which states complainant, at all the times herein mentioned, has had and now has officers and agents upon whom service of process could have been and now can be had; that there existed in said states and now exist courts of competent jurisdiction in which suits on such causes of action could have been and now can be filed and prosecuted.

And herein complainant avers that the attempted garnishment herein is not a bona-fide effort to reach the assets of complainant,

which is amply solvent and has property more than amply sufficient, subject to execution, in each of the states through which it operates and does business to more than satisfy any demand which the defendant, Edmund R. Wells, may have against it; but your complainant in this behalf avers that the institution of the suit of Edmund R. Wells against it in the District Court of El Paso County, Texas, and the issuance and service of the writ of garnishment therein is a part of a general scheme to re-establish jurisdiction in El Paso County in causes of action such as is declared upon by the said Edmund R. Wells in causes arising in other states against foreign [fol. 35] railroad corporations, and The Atchison, Topeka & Santa Fe Railroad Company, your complainant, in particular; that it was established, as per the final decree entered therein in the said cause instituted in this court of your complainant against J. F. Weeks, et al., above referred to, that your complainant was not subject to the jurisdiction of the courts of El Paso county in causes of action for personal injuries, hence the effort to circumvent the effect of the decision in that cause by the issuance and service of the writ of garnishment as is herein attempted, complainant averring that the institution of said suit of Edmund R. Wells against it and the issuance and service of the writ of garnishment thereon had not for its object the collection of any just demand against your complainant as same could have been litigated and determined and any judgment rendered collected under execution in any of the jurisdictions where complainant is doing business, but that same is an effort by the use of the process of the writ of garnishment under article 247a of the Revised Statutes of the State of Texas, to re-establish jurisdiction in the courts of El Paso County on causes of action for personal injuries against your complainant, a foreign railroad corporation, and for your complainant to submit thereto would greatly burden interstate commerce, hamper it in its business as a common carrier for hire without the state of Texas, and subject it to the great and unnecessary expense, if this effort succeeded, of litigating, far from the scene where causes of action for personal injuries arise against it, and it would be greatly hampered in its defense in that its witnesses [fol. 36] will be required to come for great distances with the added expense, which will be a burden upon interstate commerce, and in addition to which, it will be required to substitute the services of other and less experienced employees for those who are thus required to absent themselves from their usual labors; and, in the event of its inability to secure the attendance of such witnesses within this jurisdiction, it will be deprived of the right to make proper and necessary defense in each, any and all of such causes; that it should not be required to waive its constitutional right which has been invaded, as hereinabove is made to appear; that there never has been and is not now any just lawful or equitable reason or cause why such suits cannot be instituted and prosecuted in the respective states where the injuries occurred and where service can be had upon complainant and where such suits can be fully, freely and fairly litigated and justly determined; but, notwithstanding the above, complainant is informed, believes and so alleges that unless it ob-

tain relief in this Honorable Court, the practice of filing suits of this nature and character in the District Courts of the State of Texas, at El Paso, Texas, on causes of action occurring or to occur to persons in other states and residing in such other states and by the use of the writs of attachment and garnishment or one of the same, will be indefinitely continued to the great harassment, injury, annoyance, cost and expense of complainant; that the conduct of the said Edmund R. Wells in instituting said suit in the District Court of El [fol. 37] Paso County, as well as the conduct of the other respondents herein in instituting said suit within such jurisdiction, is and was as to your complainant a trespass and a wrong to it.

Twenty-third. Complainant represents that its liability for the accident out of which the suit in the District Court of El Paso County, Texas, was filed, is and was doubtful and that it had and has a meritorious defense to the same, there being a grave and serious question as to whether it was at all liable in any sum whatever, on account of the injuries alleged to have been so received.

Twenty-fourth. Forasmuch, therefore, as your complainant is without remedy, save in a court of equity, and to the end that the said defendants and each of them shall be required to make full, complete and direct answer hereto, but not under oath, answer under oath being hereby expressly waived, complainant prays that the defendants and each of them, and each and all of their attorneys and agents, may be enjoined and restrained preliminarily until the final hearing and perpetually thereafter from, in any manner, attempting to enforce the collection of the above and foregoing judgments, or either of them, so rendered in the District Court of El Paso County, Texas, and from attempting, in any manner, to compel the collection of the judgment entered against garnishee herein, or to issue execution thereon, and that the judgment entered against your complainant, as well as the judgment against the garnishee, be, in all things, declared null and void, and of no effect; and that the defendants and each of them, their attorneys and agents, be enjoined [fol. 38] from taking any other step or steps to enforce the collection or payment of said judgments, or either of same, or otherwise attempting to force either the garnishee or your complainant to pay any sum of money in satisfaction of said judgments or either of same, and that further proceedings on the cause of action so declared upon by the said Edmund R. Wells in the District Court of El Paso County, Texas, be held for naught.

May it please Your Honor to grant unto this complainant not only a writ of injunction conformable to the prayer, but also a writ of subpœna of the United States of America, directed to the said defendants and each of them, commanding them on a day certain, to appear and answer this bill of complaint (but not under oath, and to abide by and perform such order and decree in the premises as to the court may seem proper and as required by the principles of equity and good conscience; and, furthermore, as the danger to your complainant is imminent and pressing by reason of the threat of the defendants to immediately enforce collection of the judgment so en-

tered against the garnishee, which, in effect, is to force complainant to pay the judgment entered against it, and as the garnishee is amply solvent and able to respond under execution, having property in El Paso County, Texas, of greater value than the amount of the judgment so entered, and as the issuance of an execution thereon, which is imminent and pressing, will involve expense, vexation and worry, and subject complainant to annoyance and be a burden on [fol. 39] interstate commerce, as well as violative of the constitutional rights of complainant, that a temporary restraining order, as provided by law, may be issued restraining defendants and each of them, their associates and agents, in accordance with the prayer for preliminary and perpetual injunction; that the said temporary restraining order may be served immediately upon each of said defendants named herein; that if the judgment entered by default against your complainant in the District Court of El Paso County, Texas, is enforced by the payment of the judgment entered against the garnishee or otherwise, the loss thereby sustained by this complainant can never be repaired in any way but will be wholly irreparable.

The Atchison, Topeka & Santa Fe Railway Company, By W. B. Storey, Its President; Gardiner Lathrop, J. W. Terry, Wm. H. Burges, A. H. Culwell, Solicitors for Complainant.

STATE OF ILLINOIS,
County of Cook:

W. B. Storey, being first duly sworn, on oath deposes and says that he is President of the complainant, The Atchison, Topeka & Santa Fe Railway Company, in the foregoing bill and agent thereof, authorized to make this affidavit; that he is cognizant of the matters [fol. 40] and things set forth in the foregoing bill of complaint and that the statements therein are true.

W. B. Storey.

Sworn to and subscribed before me, this 1st day of March, 1922. Nelson W. Willard, Notary Public in and for the County of Cook, State of Illinois. (Seal.)

EXHIBIT A-1 TO BILL OF COMPLAINT

THE STATE OF TEXAS,
County of El Paso:

IN THE DISTRICT COURT OF EL PASO COUNTY, FOR THE 65TH JUDICIAL DISTRICT OF TEXAS, NOVEMBER TERM, 1921

To the Honorable Ballard Coldwell, Judge:

Your petitioner, Edmund R. Wells, hereinafter styled plaintiff, complaining of the Atchison, Topeka & Santa Fe Railway Company, hereinafter styled defendant, for cause of action would respectfully represent unto the court:

I

That plaintiff is a citizen of La Junta, in the State of Colorado, where he resides and has his domicile; that the defendant is a foreign corporation, duly and legally incorporated under the laws of the State of Kansas, and is a citizen of said State, where it has its domicile, and maintains its general office in Topeka, Kansas, where E. L. Copeland, its secretary and treasurer, maintains his office and [fol. 41] place of business as such secretary and treasurer.

II

That heretofore, on and prior to the 25th day of March, 1921, and subsequent to said date, defendant was a railway corporation, and engaged in running and operating and owning the line of railroad extending from Anthony, New Mexico, northerly, through the State of New Mexico, and maintained an office and local agent at Las Cruces, Dona Anna County, State of New Mexico, and that on or about the 25th day of March, 1921, it employed a large number of persons who were engaged in running and operating defendant's line of railroad into and through the State of New Mexico, and other persons whose business it was to assist in managing and operating defendant's line of railroad.

III

That on or about the 25th day of March, 1921, and prior thereto, plaintiff was employed by the defendant as a special officer, and while engaged in his duties incident to his employment, at San Marcial, New Mexico, he met with an accident and was seriously injured as is more fully hereinafter set out.

IV

Plaintiff avers and charges that on or about said 25th day of March, 1921, while engaged in the duties incident to his employment, he was called by one of defendant's employees, who at that time was engaged in assisting in operating one of defendant's passenger trains; that said employee at that time was standing on the [fol. 42] platform of one of the cars composing said passenger train, and when he called to this plaintiff it was plaintiff's duty, as said special officer, to go to said employee, in order to ascertain what duties, if any, said employee desired plaintiff to perform for the defendant, and in response to said call plaintiff mounted said platform, in order to confer and converse with defendant's said employee; that soon after he boarded said passenger car the train started, and plaintiff, having conversed with said employee, it became the right or duty of plaintiff, in his discretion as such special officer of defendant, to immediately leave the train, and he decided to do so, and while attempting to dismount from said moving train to the platform maintained at San Marcial, for the purpose of mounting

and dismounting passenger trains, and while in the exercise of due care for his own safety, he stepped into a hole or depression in said platform, and was thrown or caused to fall in such a manner as to receive the injuries hereinafter set out; and plaintiff avers and charges that it was the duty of said defendant to provide for his use, as well as the use of all other persons who might be lawfully mounting or dismounting a passenger train at San Marcial, a reasonably safe and suitable platform, on which to mount and dismount passenger trains, free from all holes, depressions or other obstruction and to inspect said platform, or cause same to be inspected, repaired and kept in a reasonably safe condition; but plaintiff avers and charges that the platform and place where he attempted to alight from said moving train had become unsafe and dangerous, by reason [fol. 13] of the fact that defendant had allowed and permitted a hole or depression to be and remain in said platform, and had failed and neglected to inspect the same, or cause same to be inspected, repaired and kept in a reasonably safe condition; that said defendant and its duly authorized agents were guilty of negligence in allowing and permitting said hole or depression to be and remain in said platform, of such a size, width and depth, and in such a position and location that any person who might be lawfully attempting to alight from a moving passenger train could step into, or be thrown into same, in the manner and way in which plaintiff stepped into same and was thrown at the time of the happening of said accident, and was guilty of negligence in not filling up said hole or repairing said platform, and making same reasonably safe for use, which said negligence and negligent acts and omissions on the part of the defendant was the direct and proximate cause of plaintiff's accident and consequent injury, for which the defendant is liable. Plaintiff says at the time of the happening of the accident he was rightfully on said passenger train, and had a legal right to mount and dismount the same at said time and place; that while he was in the act of stepping from said slowly moving train his foot or feet struck in the said hole and came in contact with same, whereby and in consequence thereof he lost his equilibrium and was thrown and caused to fall, and struck on the hard sidewalk or platform with great force and violence, whereby and in consequence thereof his knee and knee cap and the bones and ligaments thereof were broken, injured, strained and seri- [fol. 14] ously and permanently injured, rendering his leg and knee weak and practically useless.

V

Plaintiff says that at the time of the happening of said accident he was a strong, healthy, able-bodied man, earning and capable of earning a lucrative salary; that by reason of said injury he is now totally incapacitated for following his business or calling, and for doing any hard manual labor, and has thereby suffered great pecuniary loss; that he has suffered, and will continue to suffer in future, great bodily pain and mental anguish. Plaintiff says by

reason of the aforesaid facts he has been damaged in the total sum of fifteen thousand dollars.

Wherefore, plaintiff prays that the defendant be cited to answer this petition, and that on final hearing hereof he have judgment for his damages and costs of suit.

Lee, McGrady, Thomason & Edwards, Hudspeth, Wallace & Harper, Attorneys for Plaintiff.

Geo. E. Wallace being duly sworn says that the defendant, Atchison, Topeka & Santa Fe Rail Company the defendant is a corporation and is a non-resident of the State of Texas.

Geo. E. Wallace.

Sworn to and subscribed by affiant before me this 7th day of Oct., 1921. C. M. Harper, Clerk Dist. Court. By R. M. Harvey, Dpy.

[fol. 45] "EXHIBIT B" TO BILL OF COMPLAINT

(Title of Court and Cause)

THE STATE OF TEXAS,
County of El Paso:

Before me, the undersigned authority, on this day personally appeared George E. Wallace, who being duly sworn, says:

That he is attorney for plaintiff in the above styled and numbered cause, and that an original attachment has been issued in the above styled and numbered cause, as provided in chapter 1, title 11, of the Revised Statutes of the State of Texas, as shown by the records and files in this cause, to which reference is here made, and the same are made a part hereof.

Affiant further says that he and plaintiff have reason to believe and do believe that the Rio Grande, El Paso & Santa Fe Railway Company, a corporation doing business and having an office and local agent and its residence in El Paso County, Texas, is indebted to the defendant the Atchison, Topeka & Santa Fe Railway Company, and has effects belonging to said Atchison, Topeka & Santa Fe Railway Company in its possession, in El Paso County, Texas; and plaintiff prays for a writ of garnishment to issue and summons said Rio Grande, El Paso & Santa Fe Railway Company as garnishee in this cause.

Geo. E. Wallace, Attorney for Plaintiff.

Subscribed and sworn to before me by affiant, on this the 7th day of October, 1921. Eunice Hamilton, Notary Public, El Paso County, Texas.

[fol. 46] EXHIBIT C TO BILL OF COMPLAINT

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS, SIXTY-FIFTH JUDICIAL DISTRICT

No. 21137

EDMUND R. WELLS, Plaintiff,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Defendant; Rio Grande, El Paso & Santa Fe Railway Company, Garnishee

Comes now the Rio Grande, El Paso & Santa Fe Railroad Company, denying in its behalf the jurisdiction of the court herein to issue and cause to be served the writ of garnishment so issued and served, and thereon represents:

I

That the original defendant, on all of the dates herein mentioned and on all of the dates described in plaintiff's original petition, and in the affidavit for garnishment and the writ thereon issued, is and was a foreign railroad corporation existing under the laws of the state of Kansas and having its principal office and place of business in the county of Shawnee, in said state; that it had and has no line of railroad extending into or through the state of Texas, no agents therein, and was not, at the time of the accident out of which this suit arose, nor is it now, doing business within said state; that the cause of action resulting in this suit against said defendant arose in the state of New Mexico, and did not arise in the state of Texas; that said cause of action is based upon an unliquidated demand, same be-[fol. 47] ing an action for personal injuries alleged to have been received in the state of New Mexico; that because of these facts, the original defendant herein is not liable in this court nor in any court within the state of Texas, and the service of process in said cause upon said defendant did not and does not confer jurisdiction upon this or any other court in the state of Texas to hear and determine the cause as between the plaintiff and the defendant, or to render a judgment against said defendant, and because of which, the garnishment suit filed against this garnishee is not maintainable herein.

In this behalf this garnishee would further show unto the court that in the state of Colorado, where plaintiff resides and of which state he is a citizen, as well as in the state of New Mexico where the alleged cause of action asserted against the original defendant arose, said defendant is doing business and there are many courts wherein said plaintiff may assert his alleged cause of action and obtain and have judgment over and against said defendant.

In this connection, garnishee represents that said defendant is financially able to respond in satisfaction of any judgment that might

be so recovered by the plaintiff; that in each or either of said states of Colorado and New Mexico, said defendant has property subject to execution, of value many thousand times greater than any liability that might be found to exist against it on the cause of action asserted or that might be asserted by said plaintiff.

[fol. 48]

II

Relying upon the allegations in paragraph I hereof, garnishee further represents that the service of the writ of garnishment herein served upon it did not and does not confer jurisdiction upon the court over the defendant, or to hear and determine the cause of action declared upon.

(a) said suit being based upon an unliquidated demand for damages for personal injuries, there is and was no authority in law for the issuance and service of said writ of garnishment, same fixed no lien upon any properties of the defendant, and no jurisdiction is thereby conferred upon this court over said defendant or the cause of action declared upon, and any statute of the state of Texas which undertakes to confer such authority and to give jurisdiction herein is void, and for this court to undertake to enforce the same, will and would deprive said defendant of its property without due process of law, and will and would be a denial to said defendant of the equal protection of the law, as required under the fourteenth Amendment to the Constitution of the United States, and said plaintiff is not entitled to receive aid herein from or by virtue of any statute of the state of Texas;

(b) the funds and property sought to be held under the writ of garnishment herein served are not subject to said writ; said funds belong to the defendant for service performed wholly without the state of Texas and in the conduct of its interstate business as a common carrier, and represent its proportion due from this garnishee [fol. 49] as a connecting carrier of its interstate transportation charges, and no lien became or is fixed thereon by virtue of issuance and service of the writ of garnishment herein, and any properties sought to be impounded thereunder are used exclusively in the conduct of its business as an interstate carrier of freights and passengers and are therein needed and essential in such transportation and without which said defendant will and would be deprived of the use and benefit thereof in and under its obligations crested and existing by law in the performance of its duty as a common carrier, and as will be more specifically described in another paragraph hereof;

(c) articles 247a and 248 of the Revised Statutes of the State of Texas are wholly inapplicable to the facts of this case as same appear from plaintiff's original petition, and to construe the same or either thereof as authorizing the issuance and service of the writ of garnishment under the facts of this case, would and will be contrary to the provisions of the Interstate Commerce Act of 1906 as amended,

and the Transportation Act of 1920. The legislature of Texas was and is without power to fix jurisdiction over said defendant on the cause of action declared upon, as well as to fix any lien on and against any funds or property belonging to said defendant and that may be in possession of garnishee; and to construe said articles of the Texas statute or either of same as so authorizing, would and will be contrary to the provisions of the Interstate Commerce Act of 1906 as amended, and the Transportation Act of 1920;

[fol. 50] (d) articles 247a and 248 of the Revised Statutes of Texas are void because thereunder judicial power is conferred upon the clerk of the court, and to apply and enforce the same hereunder will and would deny to said defendant the equal protection of the laws required under the Constitution of the United States;

(e) the issuance and service of the writ of garnishment herein conferred no jurisdiction upon this court or any other court within the state of Texas over the defendant of the cause of action declared upon, as the service of said writ of garnishment fixed no lien on the funds or property attempted to be impounded because no judgment had been obtained against said defendant by the plaintiff prior to the issuance of said writ, and no valid judgment can be obtained against said defendant.

III

Garnishee further represents that the attempted garnishment herein is not a bona fide effort to reach the assets of the defendant, The Atchison, Topeka & Santa Fe Railway Company, same being amply solvent, as hereinabove appears, but is part of a general scheme to establish jurisdiction in El Paso county in causes of action such as is declared upon by this plaintiff on causes of action arising in other states against foreign railway corporations, and The Atchison, Topeka & Santa Fe Railway Company in particular, there being courts of competent jurisdiction within each and every state through which the said The Atchison, Topeka & Santa Fe Railway Company may operate or in which it is doing business, in which litigant may [fol. 51] receive such redress for alleged wrong as the law may warrant, and to allow the use of the courts in El Paso county for this purpose will unnecessarily burden the same as well as work a great hardship upon said railway company in that it will be required to expend greater sums of money than would be necessary were said causes prosecuted in a jurisdiction wherein said railway company is doing business, and this will deprive and tend to deprive it of its property without due process of law, and to make necessary defense, if said suits are prosecuted within this jurisdiction, will require the attendance of witnesses at great distances from home, and it will be necessary for its employees, material in such action or actions, to absent themselves from their usual and customary labors a greater length of time than would ordinarily be necessary, and said railway company would thus be deprived of their services for a greater length of time, which will be added expense to said railway company, and

all of which expenses, as herein enumerated, will be a burden upon interstate commerce, deprive defendant at the time being of experienced employees in the handling and to the detriment of interstate commerce, and, in the event said railway company is not able to secure the attendance of such witnesses within this jurisdiction, it will be deprived of the right to make proper and necessary defense in each, any, and all of said causes.

And in this behalf, garnishee represents that it is advised, informed and so alleges that it has been judicially determined that the said The Atchison, Topeka & Santa Fe Railway Company, defendant [fol. 52] herein, is not subject to the jurisdiction of the courts of El Paso county in causes of action such as is herein declared upon, and that this fact is known to the plaintiff and to the attorneys of record representing him, and that the bringing of this action against the defendant in and under these circumstances, is another and further annoyance to it, as well as a hindrance, and same will be a hindrance to it in the conduct of the business it is required to conduct by law.

IV

Subject to the defenses herein interposed, and relying upon the facts alleged, garnishee represents that at the time the writ of garnishment herein was served upon it and at all times since and now, it was and is indebted to The Atchison, Topeka & Santa Fe Railway Company, defendant herein, in the net sum of one hundred and fifty thousand, one hundred and sixty nine and 86/100 ($150,169.86); that same is made up of traffic balances due from garnishee to said defendant, accruing in the transportation of freights and passengers wholly without the state of Texas; that said funds belong to the defendant as its proportion of the gross earnings from transportation of freights and passengers exchanged between garnishee and defendant for and during the period covered by said writ of garnishment; that each and all of same was earned by said defendant and accrues to it on its interstate business, the service therefor being performed and said amounts accruing to it for service performed wholly without the state of Texas, and that each and all of said funds are by said defendant needed in the conduct of its business as [fol. 53] interstate carrier and in the performance of the obligations required of it by law and the rulings of the Interstate Commerce Commission, and the laws of the various states through which it operates and in which it does business.

Garnishee would further show to the court that at the time the writ herein was served, and at all times since, it had and has in its possession railroad cars, engines and other equipment belonging to the defendant, which railroad cars, engines and other equipment were and are used continually in the conduct of its transportation business; that it received and now received from the defendant, said railroad cars, engines and other equipment under an agreement or arrangement between it and the defendant, entitling it, the garnishee, to the use and possession thereof in the conduct of its business as a common carrier while so in its possession, and that without the same

it would have been and will now be unable to conduct its business as a common carrier and perform the obligations and duties imposed upon it as such by the law, both in its interstate and intra state business; that under its arrangement or agreement with the defendant, it had and has the right to dispatch said railroad cars, engines and other equipment to the place of destination on its own line and is not required to transfer freights or passengers to its own cars for further and final transportation; that it used and uses the empty cars so coming to it for the carrying of freights and passengers between different points on its own line and on the lines of other railroad companies directly or indirectly connected with either its line or that of the defendant, upon the payment of fixed charges therefor; [fol. 54] that said railroad cars, engines and other equipment while so in its possession on its own line, are, for the purposes of transportation and the time being, part of its equipment and to the possession and use thereof as such it is entitled and of which it will be deprived under the process herein issued if final judgment herein may or shall be entered against it; that each and all of the railroad cars, engines and other equipment herein described were and are in daily use by garnishee in the conduct of its business as a common carrier; that garnishee is unable to say the number of railroad cars, engines or other equipment which it ordinarily had or has in its possession at any particular date, nor to give a more definite or better description thereof than to say that same consists of box and flat cars, passenger, baggage, mail and express cars, and railroad locomotives, and that on November 2, 1921, it so had in its possession forty-six box cars, sixteen stock cars, ninety-eight coal cars and one flat car belonging to the defendant; that each and all of said cars were so in the possession of garnishee under the contract, arrangement and agreement which it has with the defendant, and each and all of same were in use exclusively in the handling of interstate and foreign commerce and to the possession and use of same and each of same, said garnishee was entitled, as hereinabove averred in general terms; and that also, on said 2d day of November, 1921, it had in its possession a freight engine engaged in road service belonging to said [fol. 55] defendant, said engine being so in its possession under the agreement and understanding between garnishee and defendant hereinabove referred to, and same is and was used exclusively in the handling of interstate and foreign commerce, and to the use and possession of same, said garnishee was and is entitled to same, and without the same it could not conduct its business as a common carrier and as required by law, and that on said November 2, 1921, it likewise had in its possession four passenger road engines which belonged to the defendant and which had been delivered to garnishee and were at that time in its possession under and by virtue of the arrangement and agreement between it and the defendant hereinabove referred to, each and all of said engines being used in the handling of the interstate business and in the handling of passenger trains so engaged by it and the defendant, and to the use and possession of same it was and is entitled, and that to deprive it of such use, would be to hinder, delay, impede and retard its business as a

common carrier interstate of passengers, and same would be violative of the terms and conditions of the contract under which it held possession thereof; that on said date, it likewise had in its possession four switch engines working and operating as such in its yards at El Paso, Texas, each and all of said engines being engaged in interstate and foreign commerce business of garnishee, and all so in its possession under and by virtue of the contract and agreement between it and the defendant and without which it could not make up its trains or distribute cars or make deliveries thereof as in duty bound [fol. 56] it is and was required to do; that each and all of said engines, as well as the other equipment hereinabove referred to, is and was in daily use in interstate and foreign commerce, and that the seizure of them or any of them under process would necessarily interrupt the handling of such commerce.

Garnishee further avers that other engines and cars were and are used in trains operated across the state lines dividing the state of Texas and the state of New Mexico at which point this line connects with that of the defendant company; that each and all of same were in the possession and use of garnishee under the agreement and arrangement between it and the defendant company hereinabove averred and to the use and possession of each and all of same, said garnishee was and is entitled; that the state business done and transacted by this garnishee is very small and forms but a light proportion of the total business done and transacted by it as a common carrier, so that each and all of the engines and cars belonging to defendant and in the possession of garnishee as hereinabove averred, were and are practically at all times engaged in interstate and foreign commerce, and that the seizure of the same would necessarily interfere with and interrupt the interstate and foreign commerce.

Garnishee is unable at this time to more definitely aver and allege the equipment in its possession belonging to the defendant, The Atchison, Topeka & Santa Fe Railway Company, at any time but does aver and allege that at each and all of the times set out and men- [fol. 57] tioned in the writ of garnishment herein served upon it, it had and has in its possession railroad equipment which, and all of which, is used in the handling of its interstate and foreign commerce and of far greater value than the amount claimed and demanded by the plaintiff in his suit against the defendant.

Except as hereinabove referred to, and in the manner and form that same is averred, garnishee has no other effects of the defendant, The Atchison, Topeka & Santa Fe Railway Company, in its possession and did not so have when the writ herein was served upon it; that it does not know of any other persons who are indebted to said The Atchison, Topeka & Santa Fe Railway Company or who have effects belonging to it in their possession.

Wherefore, comes now the garnishee, Rio Grande, El Paso & Santa Fe Railroad Company, and says that for the above and foregoing reasons and each of them, jointly and severally, this court has no jurisdiction of the defendant, The Atchison, Topeka & Santa Fe Railway Company, nor of this garnishee; that the funds hereinabove described are not subject to the writ of garnishment served nor are

the other property and effects so subject; that it should not be held liable herein; that no lien was had or became fixed upon and against any of said funds or other property by reason of the issuance and service of the writ of garnishment herein; that no valid judgment can be rendered against said defendant to which same can be applied, and it therefore prays that it go hence and be discharged on this, [fol. 58] its answer, and that it be allowed a reasonable attorney's fee in this behalf.

Turney, Burges, Culwell, Holliday & Pollard, Attorneys for Garnishee, Rio Grande, El Paso & Santa Fe Railroad Company.

The State of Texas,
County of El Paso:

Before me, the undersigned authority, on this day personally appeared R. F. Goering, who, on oath, deposes and says that he is the general manager of the Rio Grande, El Paso & Santa Fe Railroad Company, garnishee in the suit of Edmund R. Wells, vs. The Atchison, Topeka & Santa Fe Railway Company, defendant, and agent of said garnishee, authorized to make this affidavit, and that the facts stated in the above and foregoing answer in garnishment are true and correct.

R. F. Goering.

Sworn to and subscribed before me this 5th day of November, 1921. C. W. Harper, Dist. Clerk in and for El Paso County, Texas.

[fol. 59] Exhibit D to Bill of Complaint

District Court, El Paso County, 65th Judicial District

No. 21135

Edmund R. Wells

vs.

Atchison, Topeka & Santa Fe Railway Company.

21st December, 1921.

Be it remembered on this day this cause was called for trial in 65th District Court of El Paso County. Plaintiff appeared in person and by attorneys but defendant failed to appear or answer although duly cited by publication and duly cited by service of non-resident notice upon it in the state of Kansas. And the court on a former day of this term, having appointed E. F. Cameron and Robt. T. Neill, attorneys of this court, to represent the defendant, a non-resident of Texas, cited by publication, they appeared under such appointment by the court and defended upon behalf of defend-

ant. A jury being waived, after completing the evidence the court finds for plaintiff $1,000.00 damages against defendant.

It is therefore adjudged by the court that plaintiff, Edmund R. Wells, recover of the defendant, Atchison, Topeka & Santa Fe Railway Company, a corporation, $1,000.00 damages with 6 per cent per annum interest thereon and all costs of this suit, including a fee of $600.00 now allowed to Cameron and Neill for representing the defendant, and ordered taxed as costs.

It is ordered that the statement of the evidence introduced be made up and approved and filed in this court.

It further appearing that at the time of filing this suit, the plain-[fol. 60] tiff sued out an original attachment against the defendant or its property and afterwards on the same day caused to be issued a writ of garnishment summoning the Rio Grande, El Paso & Santa Fe Railroad Company to answer as garnishee what if anything it was indebted to the defendant, etc., which writ was duly served upon said garnishee in El Paso County, Texas, on the day of its issue and which garnishment proceeding is numbered 21,137 on the docket of this court, styled Edmund R. Wells vs. Rio Grande, El Paso & Santa Fe Railroad Company and said garnishee having answered showing that at time of service of said writ it was indebted to defendant in a sum far in excess of the amount of said judgment and all costs and had in its possession effects of defendant.

It is therefore adjudged by the court that the above recovery adjudgment in favor of plaintiff against the defendant, Atchison, Topeka & Santa Fe Railway Company is only effective against said defendant to the extent that the same may be satisfied out of said garnishment proceeding against the above named garnishee, and that no execution issue on said judgment against said original defendant save in so far as may be permitted or authorized by order of this court in said garnishment proceeding, this court not having yet determined to what extent it will render judgment against said garnishee.

[fol. 61] EXHIBIT E TO BILL OF COMPLAINT

No. 21137

(Title of Court and Cause)

On this, the 24 day of Jan., 1922, came on to be heard the above styled and numbered cause, plaintiff appearing by attorney and garnishee appearing by attorney, and both parties having waived a jury and agreed to submit the issues of fact as well as of law to the court without a jury; and upon an agreed statement of facts, and the court having considered the same and argument of counsel, is of the opinion that plaintiff is entitled to recover; that the defenses interposed by the garnishee in its answer are not well taken and that under the facts appearing and applicable — law, it is liable herein to plaintiff, and it being made to appear that plaintiff had

heretofore and on to-wit, December 21st, 1921, recovered a judgment in this court against the defendant, The Atchison, Topeka & Santa Fe Railway Company, in the sum of four thousand dollars ($4,000) and costs of suit, and that the garnishee was indebted to the defendant and had assets in its possession belonging to the defendant of far greater value than the amount of said recovery, the court is of the opinion that plaintiff should recover herein against the garnishee in the amount of the judgment heretofore obtained by him against the said defendant, The Atchison, Topeka & Santa Fe Railway Company.

It is therefore considered, ordered and adjudged by the court that the plaintiff, Edmund R. Wells, do have and recover of and from [fol. 62] the Rio Grande, El Paso & Santa Fe Railroad Company, garnishee, the sum of four thousand dollars ($4,000), together with all costs of suit, as well as costs incurred in the suit of Edmund R. Wells vs. The Atchison, Topeka & Santa Fe Railway Company, hereinabove referred to; that this judgment bear interest at the rate of six per cent per annum until paid, and for all of which, let execution issue.

It is the further order, judgment and decree of this court that when the above and foregoing judgment is paid and satisfied in full, said payment and satisfaction shall likewise be in full payment, satisfaction and discharge of the judgment hereinabove referred to, and as entered in this court in the case of Edmund R. Wells vs. The Atchison, Topeka & Santa Fe Railway Company and numbered 21,135 on the docket thereof; to all of which and to the entry of this judgment, as well as the conclusions of law thereon, here and now filed by the court, said garnishee, Rio Grande, El Paso & Santa Fe Railroad Company, in open court duly excepted and gave notice of appeal to the Court of Civil Appeals of the Eighth Supreme Judicial District of Texas.

Ballard Colwell, Judge.

[File endorsement omitted.]

[fol. 63] In the District Court of the United States, at El Paso, Texas

[Title omitted]

Defendants' Answer—Filed Mar. 22, 1922

Now come the defendants and for answer to the plaintiff's bill of complaint filed herein, they say:

1. They do not admit the truth of any of the allegations of the bill stating conclusions of law or conclusions of fact nor what the laws of Texas are.

2. These defendants deny the allegation in paragraph Ninth of the bill which conveys the idea that the judgment therein men-

tioned was claimed or sought to be enforced by the defendants to any extent other than subjecting the debt owing by the garnishee to the plaintiff in this suit.

3. These defendants say that such judgment was only valid to the extent of the debt or funds impounded by the writ of garnishment referred to in the bill, and these defendants have never made any other contention.

4. These defendants deny that part of paragraph Thirteenth of the bill in substance claiming that no valid citation or process was ever served upon the defendant in the suit of Wells against the Atchison, Topeka & Santa Fe Railway Company.

5. These defendants say that the facts are that citation by publication, as well as service of notice beyond the limitations of Texas were both properly served in that case.

[fol. 64] 6. These defendants deny all the allegations in paragraph Fifteenth of the bill, and they say that the statute there attacked being Article 247a is not in conflict with any act of Congress or rule of the Inter-state Commerce Commission.

7. These defendants deny the allegations in paragraph Nineteenth of the bill, and they especially deny the funds there referred to would be needed by the plaintiff in the carrying on of its business as a common carrier either within or without the State of Texas, and deny that the plaintiff is required to conduct any business, inter-state or otherwise, that would require the use of such funds, and deny that there is any law or any rule of the Interstate Commerce Commission that would require it to use such funds as a common carrier or in order to operate any of its other business, and deny that the withholding of such funds by garnishment or judgment would violate any law or any rule of the Inter-state Commerce Commission or would deprive the plaintiff of its ability to perform any of its services as a common carrier, and deny that the plaintiff needs such funds in the operation of its business as a common carrier, and deny the allegation that the funds were not subject to garnishment.

8. These defendants deny that it was necessary for the plaintiff to have the funds so impounded in order that it might properly serve El Paso and its commerce without subjecting it to any undue prejudice, disadvantage or discrimination, and defendants deny that it was necessary that the garnishee should collect freight charges for [fol. 65] the plaintiff or that the garnishee should sell tickets over the road of the plaintiff.

9. These defendants deny that the enforcement of the judgment in question will impede or hinder the plaintiff in the performance of its duties as a carrier imposed upon it by any law or rules of the Inter-state Commerce Commission.

10. These defendants deny the allegation in paragraph Twenty-second of the bill, to-wit, that there is no just, lawful or equitable rea-

son why suit should not have been prosecuted in the respective states where the injuries occurred, and deny the allegation that the attempted garnishment is not a bona fide effort to reach the assets of the plaintiff, and deny the allegation that the suit brought by Wells is a part of a general scheme to establish jurisdiction in El Paso County in causes of action such as declared upon by him arising in other states, and they deny the allegation that the garnishment so sued out by Wells had not for its object the collection of any just demand against the plaintiff, and deny the allegation that suits in Texas against the plaintiff would subject it to great and unnecessary expense. The defendants say that the plaintiffs could always take depositions and it is never necessary to have the witness attend in person, and the defendants deny the allegation that it materially interferes with the right of defendant to carry on its business as a common carrier while its witnesses are attending court in Texas.

11. These defendants deny the allegation in paragraph Twenty-[fol. 66] third of the complaint alleging that plaintiff had a meritorious defense to the suit brought by Wells against it.

Wherefore, these defendants pray that the plaintiff take nothing and that its complaint be dismissed upon the merits at the cost of the plaintiff, and for all other relief to which these defendants are entitled.

Geo. E. Wallace, J. G. McGrady, Lea, McGrady, Thomason & Edwards, Attorneys for Defendants.

[File endorsement omitted.]

In the District Court of the United States, Western District of Texas, El Paso Division

[Title omitted]

Request for Submission of the Merits—Filed Mar. 22, 1922

Come now the complainant and defendants and represent that, as this cause is now at issue, the defendants having answered fully herein, and the facts having been developed and said cause submitted upon an agreed statement of facts, and request the court that [fol. 67] such judgment as may be entered be a final judgment upon the merits of the cause.

Wm. H. Burges, A. H. Culwell, Attorneys for Complainant. Geo. E. Wallace, Lea, McGrady, Thomason & Edwards, Attorneys for Defendants.

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION

[Title omitted]

STATEMENT OF FACTS—Filed Mar. 16, 1922

It is agreed that this cause may be submitted upon the following statement of facts:

First

Edmund R. Wells, through his attorneys, Hudspeth, Wallace & Harper and Lea, McGrady, Thomason & Edwards, filed suit in the District Court of El Paso County, Texas, October 7th, 1921, against the Atchison, Topeka & Santa Fe Railway Company for damages growing out of personal injuries alleged to have been sustained on the [fol. 68] 25th day of March, 1921, a copy of the petition so filed is attached to Complainant's Bill herein, marked "Exhibit A," and said copy may be considered as evidence thereof; said plaintiff caused notice to a non-resident defendant, as authorized under the Texas Statute, together with a certified copy of his petition in said cause, to be delivered to E. L. Copeland, Secretary and Treasurer of the Atchison, Topeka & Santa Fe Railway Company at Topeka, Kansas on the 13th day of October, 1921, and in addition thereto service by publication after proper affidavit was filed was had in said cause by publication of said citation in the Labor Advocate, a newspaper published in El Paso County, Texas, which said publication was made for the length of time required under the laws of the State of Texas; that on the date said suit was filed the plaintiff therein, through one of his attorneys, made affidavit for an attachment as provided under Title 11, Chapter 1, Article 247A of the Revised Statutes of the State of Texas, said Article 247A of said Statute is correctly set out in Paragraph 6 of Complainant's Bill herein, and therewith filed his bond as provided for in said Article, same being in the sum of $31,000.00 as fixed by the Judge of said Court, which said bond was approved by the Judge and the Clerk of said Court, and thereunder a writ of attachment was forthwith issued as prayed for, which said writ of attachment was placed in the hands of the Sheriff of El Paso County, Texas, said writ requiring the said Sheriff to levy on any goods, lands, tenements or other property of the said defendant, Atchison, Topeka & Santa Fe Railway Company, [fol. 69] found in or situated in El Paso County, Texas; that said writ of attachment was returned on the 7th day of October, 1921, by said Sheriff "No property of the defendant in said writ found in El Paso County, Texas"; that based upon the affidavit and writ and bond for attachment as hereinabove described said plaintiff, by his attorney, made affidavit, a copy of which is attached to Complainant's Bill herein, and Marked "Exhibit B" for identification, and thereon caused to be issued a writ of garnishment directed Sheriff or any Constable of El Paso Co., commanding him to summon the Rio Grande,

El Paso & Santa Fe Railway Company, Garnishee, which said writ was duly served, and in response to which said Garnishee filed its answer, a copy of which answer so filed being attached to Complainant's Bill herein, and Marked "Exhibit C."

Second

That the Atchison, Topeka & Santa Fe Railway Company on all the dates mentioned in Plaintiff's original petition, as well as before and since said time, is and was a foreign railroad corporation existing under the laws of the State of Kansas, and having its principal office and headquarters in the County of Shawnee, said State, and a citizen thereof; that it had and has no line of railroad extending into or through the State of Texas and no Agents therein, and was not at the time of the accident out of which said suit arose nor is it now doing business within the State of Texas; that the cause of ac-
[fol. 70] tion made basis of said suit arose in the State of New Mexico, where the said Edmund R. Wells was then employed by the said Railway Company; that each and all of the defendants named in the Bill of Complaint filed herein are citizens and residents of the State of Texas, and of the Western District, El Paso Division of this Court; that at the time of the accident, out of which the suit of Wells against the Railway Company filed in the District Court of El Paso County, Texas, arose the said Wells was a resident of the State of Colorado; That the cause of action declared upon therein was an unliquidated demand; that there were and was in the State of Colorado, of which State plaintiff was a resident at the date his suit was filed in the State Court, as also there were and now are in the State of New Mexico, where the alleged cause of action arose, Courts wherein said plaintiff might assert his alleged cause of action and obtain and have jurisdiction thereon against the Atchison, Topeka & Santa Fe Railway Company; that the said Atchison, Topeka & Santa Fe Railway Company is and was financially able to respond and was so able at all of the dates hereinabove referred to in satisfaction of any judgment that might be so recovered by the said Wells; that the Atchison, Topeka & Santa Fe Railway Company has in the States of Colorado and New Mexico, and at all of the dates hereinabove referred to did have, property subject to execution of value many thousand times greater than any liability that might be found to exist against it on the cause of action asserted.

[fol. 71] Third

That the defendant, Atchison, Topeka & Santa Fe Railway Company, did not appear at the November Term of said District Court of El Paso County, Texas, nor on November 7th, 1921, as cited, and did not, in any way, manner or form, enter its appearance or subject itself to the jurisdiction of said District Court of El Paso County, Texas, in said cause of Edmund R. Wells against it, and did *not* act or thing indicating that it had in any way been properly cited to appear and answer in said suit and cause, or that it was

subject to the jurisdiction of the District Court of El Paso County, Texas, in said cause; nor has it ever entered such appearance nor in any way subjected itself to the jurisdiction of said court in said cause; that because of the failure and refusal of said defendant, Atchison, Topeka & Santa Fe Railway Company, to so appear, the Court, on the 8th day of November, 1921 in pursuance to Article 1941 of the Revised States of the State of Texas, which reads as follows:

Art. 1941. (1316.) (1212, 1315.) Procedure in Case of Service by Publication Where no Answer, etc.—Where service of process has been made by publication, and no answer has been filed nor appearance entered within the time prescribed by law, the court shall appoint an attorney to defend the suit in behalf of the defendant, and judgment shall be rendered as in other cases; but, in every such case, a statement of the evidence, approved and signed by the judge, (Id. 724) shall be filed with the papers of the cause as part of the record thereof. The court shall allow such attorney a reasonable compensation for his services, to be taxed as part of the costs of the suit.

appointed E. F. Cameron and Robert T. Neill, attorneys, to defend the said suit in behalf of the defendant"; that the appointment of said attorneys was never at any time authorized or ratified by the defendant, and the judgment was, in fact and in law, a judgment without appearance by or in behalf of the said Atchison, Topeka & Santa Fe Railway Company.

Fourth

That the plaintiff in said cause, Edmund R. Wells, acting by and through his attorneys of record the other defendants herein, secured and took judgment by default in said cause against said Railway Company on December 21st, 1921 for the sum of Four Thousand Dollars ($4,000.00), a copy of said judgment so taken is attached to Complainant's Bill of Complaint and marked "Exhibit D" for identification, and demand has been made for the payment of the same, written notice to that effect having been served upon attorneys, for Complainant herein by the said defendants; That the defendants, Hudspeth, Wallace & Harper and Lea, McGrady, Thomason & Edwards, by assignment, have an undivided one-third interest in the judgment so recovered and above described.

That on January 24th, 1922 judgment was entered in the case of (Id. 731) Edmund R. Wells against the Rio Grande, El Paso & Santa Fe Railway Company, Garnishee, by and under which the defenses interposed by said Garnishee in its answer to the writ of garnishment, said answer hereinbefore referred to as "Exhibit C," were held for naught, each and all of the defenses being overruled, and by and under the terms of the decree so entered said Garnishee was held liable to plaintiff to the extent of the amount recovered by plaintiff against the defendant, Complainant herein, and said judg-

ment so entered in the suit against the Rio Grande, El Paso & Santa Fe Railway Company, as Garnishee, is now a demand against the said Garnishee, and likewise a demand against the Atchison, Topeka & Santa Fe Railway Company, as and by the terms of said decree so entered in said garnishment suit the funds necessary to satisfy the judgment entered in the case of Edmund R. Wells against the Atchison, Topeka & Santa Fe Railway Company, and in the hands of Garnishee, are being and will be with-held by said Garnishee from the Atchison, Topeka & Santa Fe Railway Company, and it has been and is deprived of the use and benefit thereof, a copy of the judgment entered in said Garnishment suit is attached to Complainant's Bill of Complaint herein and marked "Exhibit E" for identification; that the funds and property sought to be held under said writ of garnishment belong to the defendant, Atchison, Topeka & Santa Fe Railway Company, for services as a common carrier performed wholly without the State of Texas, and in the conduct of [fol. 74] its inter-state business as a common carrier, and the funds so sought to be held and which funds are impounded under the judgment hereinabove described represent its proportion due as connecting carrier on its interstate transportation charges.

Fifth

That the Atchison, Topeka & Santa Fe Railway is and was at all the dates herein referred to a common carrier for hire, doing business as such in the states of Illinois, Iowa, Missouri, Kansas, Oklahoma, Colorado, New Mexico, Arizona and California and in each and all of said State said Railway Company had and has property subject to execution of far greater value than sufficient to satisfy any damage that the plaintiff Wells might sustain, and in each and all of which said States there were and are Courts of competent jurisdiction to hear and determine any cause which he might present; that in said cause, the witnesses in behalf of the Railway Company material to its defense was and were its employees whose attendance as witnesses would be necessary in the opinion of the defendant, and during which attendance they will be required to absent themselves from their usual and customary labors and said defendant would be deprived of their services from such ordinary and customary labors during the time of their attendance upon Court; that if the defendant should elect to bring them into Court in person, for such attendance in Court said defendant would be required to pay them their expenses, and a reasonable compensation [fol. 75] for their loss of time in such attendance upon Court and that the witnesses necessary for such defense in any cause filed by Wells growing out of the accident in question reside at San Marcial, New Mexico, one hundred and fifty (150) miles from El Paso, and are four (4) in number.

Sixth

That the said Atchison, Topeka & Santa Fe Railway Company at no time promised to settle or litigate the claim of the said Edmund

R. Wells against the defendant within the State of Texas; that before and at the time of the filing of said suit by the said Edmund R. Wells in the District Court of El Paso County, Texas, said Railway Company owned and operated and since then has owned and operated and now owns and operates lines of railroads extending through a number of counties in the State of New Mexico, including the County of Socorro in which said Edmund R. Wells claims to have been injured on the 25th day of March, 1921, and including the Counties in which are all of the towns of Las Cruces, Hillsboro, Las Lunas and Albuquerque, and also in the County in which La Junta, Colorado is situated, and in all of which Counties at all times herein mentioned said Railway Company was transacting business and had officers and Agents upon whom service of process could have been had and now can be had, and in each of which said Counties there then was and now is a Court having jurisdiction of the cause of action of said Wells.

Seventh

[fol. 76] That under the laws of the State of Texas no special appearance could be entered by the Railway Company in the cause filed by the said Edmund R. Wells in the District Court of El Paso County, Texas for the purpose of testing the service of citation therein nor for the purpose of questioning the jurisdiction of said Court over defendant, but under the laws of the State of Texas an appearance for any purpose would be and will be held a general appearance for all purposes, and said Railway Company would thereby have subjected itself to the jurisdiction of said Court for all purposes, and it would have been necessary for it to have gone to the expense of bringing its witnesses from New Mexico in order to make proper defense therein or to have taken their depositions; that said Railway Company could not have entered its appearance in the District Court of El Paso County, Texas for the purpose of moving to set aside said judgment by default or for the purpose of testing the amount of damages to which said Edmund R. Wells may be entitled or for any purpose whatever, without subjecting itself to the jurisdiction of the District Court of El Paso County, Texas for all purposes.

Eighth

That the monies belonging to complainant, and impounded under the writ of garnishment served upon the Rio Grande, El Paso & Santa Fe Railway Company, represent the balance due to complainant from said Garnishee as its proportion of the transportation charges due entirely to inter-state traffic conducted wholly without the State of Texas, and the same would have been used by com-[fol. 77] plainant in the conduct of its business as a common carrier in its interstate business and intra-state business in the states thru which it operates; that the cars, engines, and railroad equipment belonging to complainant and in the possession of the Garnishee, as set up in its answer, are lawfully in the possession of the Garnishee under a contract with the complainant, under and by which said

Garnishee was entitled to the exclusive use and possession thereof as a common carrier of interstate freights, all such engines, cars and other railroad equipment having been delivered to Garnishee by complainant as connecting carrier of inter-state freights, and same would have been returned to complainant in due course of business, and were each and all needed by your complainant, when so returned, in the conduct of its business as an inter-state carrier and intra-state carrier.

That for many years it has been and is now the custom and practice of rail carriers to allow their freight charges to follow the shipments, so that the delivering line collects the entire freight charges of all carriers over whose lines the shipments have moved, and the delivering carrier accounts to the other carrier or carriers for its or their proportion of the feight collected.

That for many years its has been and is now the custom, in order to serve the convenience of passengers, for the initial line to sell passenger tickets and coupons good for transportation over connecting lines and to collect from the passenger the entire charge, and to account to the connecting line or lines for its or their proportion thereof.

[fol. 78] That the Garnishee, Rio Grande, El Paso & Santa Fe Railway Company, owns and operates a railroad only 20.22 miles long, extending from El Paso to the New Mexico-Texas State line, where it connects with the railroad of complainant.

That the City of El Paso has a population of more than fifty thousand (50,000) people, and has a very large commerce originating therein and passing through. It is to the advantage of plaintiff, as it has done in the past, to permit its cars and engines to run over the railway of the Garnishee from and to El Paso; and that this is likewise done under a contract as hereinabove referred to; that it is likewise customary and to the advantage of plaintiff to permit Garnishee to collect the freight charges for the proportion thereof accruing to plaintiff on the freight charges over its line destined to El Paso, and to permit the said Garnishee to sell through tickets good for passage over the railroad of plaintiff, and to collect the charges from the passengers, and to account to plaintiff for its proportion thereof; that the monies due plaintiff by Garnishee hereinabove mentioned were monies so collected by Garnishee under such practices for account of plaintiff.

Ninth

That Article 293 of the Revised Statutes of the State of Texas reads as follows:

"Art. 293. (239.) (205.) Judgment Against the Garnishee When He is Indebted.—Should it appear from the answer of the garnishee, made in either of the modes provided for in this chapter, [fol. 79] or should it be otherwise made to appear, as hereinafter provided, that the garnishee is indebted to the defendant in any amount, or was so indebted when the writ of garnishment was served, the court shall render judgment for the plaintiff against the

garnishee, for the amount so admitted or found to be due to the defendant from the garnishee, unless such amount shall exceed the amount of the plaintiff's judgment against the defendant, with interest and costs, in which case it shall be for the amount of such judgment, interest and costs."

That Article 1874 of the Revised Statutes of the State of Texas, reads as follows:

"Art. 1874. (1235) (1235) Citation by Publication.—Where any party to the suit, his agent or attorney, shall make oath at the time of instituting the suit, or at any time during its progress, that the party defendant is a non-resident of the state, or that he is absent from the state, or that he is a transient person, or that his residence is unknown to the affiant, the clerk shall issue a citation for the defendant, address to the sheriff or any constable of the county in which the suit is pending. Such citation shall contain a brief statement of the cause of action, and shall command the officer to summon the defendant by making publication of the citation in some newspaper published in his county, if there be any newspaper pub-[fol. 80] lished in the judicial district where the suit is pending; but if there be no newspaper published in such judicial district, then it shall be published in the nearest district to the district where the suit is pending. Such citation shall be published one in each week for four consecutive weeks previous to the return day thereof. (Acts March 16, 1848, p. 106, Sec. 13; March 15, 1875, p. 170, Sec. 1. Acts 1879, ch. 96, 0.103, P. D. 25.)"

Section 6, Article 10 of the Constitution of Texas is as follows:

"No Railroad company organized under the laws of this State shall consolidate, by private or judicial sale or otherwise, with any railroad Company organized under the laws of any other State or of the United States."

Article 6406 of the Revised Statutes of the State of Texas reads as follows:

"No corporation, except one chartered under the laws of the State of Texas, shall be authorized or permitted to construct, build, operate, acquire, own or operate any railway within this State."

Article 1861 of the Revised Statutes of the State of Texas reads as follows:

"Art. 1861. (1223) Foreign Corporations, How Served.—In any suit against a foreign, private or public corporation, joint stock company or association or acting corporation or association citation or other process may be served on the president, vice-president, sec-[fol. 81] retary or treasurer, or general manager, or upon any local agent within this state, of such corporation, joint stock company or association, or acting corporation or association. (Acts of 1855, p. 79.)"

Tenth

That because of the rendition of the judgment in the garnishment suit of Edmund R. Wells against the Rio Grande, El Paso & Santa Fe Railway Company, hereinabove referred to, said Garnishee is now withholding and will continue to withhhold sufficient of the funds in its possession belonging to complainant to satisfy the judgment so entered against it, and the defendant herein will attempt to apply to the extinguishment of said judgment sufficient of said funds as will satisfy the demands of defendant, which said demands are evidenced by the judgment entered in favor of Edmund R. Wells against your complainant, as well as the judgment entered in the garnishment suit hereinabove mentioned; that demand has been made by the defendants upon the Garnishee for the payment of said judgment and that the said Edmund R. Wells is insolvent, and there would be no voluntary return of any funds paid to him in satisfaction of said judgment, in the event said judgment should afterwards be set aside.

Eleventh

That for many years prior to the entry of the final decree in the case of your complainant against J. F. Weeks, et al. Numbered 109 In Equity on the docket of this Court, it had been the practice of the attorneys residing in El Paso to institute suit against your com- [fol. 82] plainant in the Courts of El Paso County, for injuries occurring to persons in the state of Illinois, Kansas, Colorado, New Mexico, Arizona, Missouri and California, and wherein the plaintiffs respectively were non-residents of the State of Texas; that there had been filed prior to the time plaintiff exhibited its bill in the Weeks case and during the six years immediately preceding the filing of said bill, more than seventy-five suits in the State Courts of El Paso County, Texas for personal injuries occurring as above alleged, and in which many thousands of dollars were involved, and in which cases in order to prevent default it was necessary for your complainant to defend in said causes, and it so defended said cases by bringing numerous employees from their regular work in such other States to El Paso to testify, and during the absence of said employee witnesses from their regular work, substitutes were employed at expense to per- from the services of said employees; that since the entry of the final decree in the above entitled Weeks case, no such suits have been filed in the State Courts of El Paso County, Texas against complainant until the institution of the suit herein complained of; that had the suit of Edmund R. Wells against your complainant been instituted in any State through which complainant operates or does business, it would have filed answer therein denying liability and would have defended to the extent of its ability against any relief sought.

Twelfth

[fol. 83] Either party may offer any other, further or additional testimony provided same does not vary or contradict anything herein contained.

Turney, Burges, Culwell, Holliday & Pollard, Attorneys for Complainant. Lea, McGrady, Thomason & Edwards, Attorneys for Defendant.

Approved this 3d day of May A. D. 1922.

W. R. Smith, Judge.

[File endorsement omitted.]

In the District Court of the United States for the Western District of Texas, El Paso Division

[Title omitted]

Decree—Filed Mar. 24, 1922

The above numbered and entitled cause being at issue, and all parties defendant having answered to the merits, same was regularly called for trial, and the Court having heard and considered the evidence offered, consisting solely of agreed statement of facts filed herein, as well as the argument of counsel thereon, and said cause having been finally submitted, the Court, after consideration on this the 22nd day of March, A. D. 1922 at and during the October Term of this Court, adjudged and decreed that there was no equity in complainant's bill, the Court being of the opinion that under the [fol. 84] facts appearing and applicable law the Complainant was subject to the jurisdiction of the Courts of Texas in the matter herein complained of and was not entitled to the issuance of a writ of injunction, either temporary or permanent therein.

It is therefore, the order, judgment and decree of this Court that the defendants, Edmund R. Wells, Claude B. Hudspeth, George E. Wallace, A. J. Harper, Tom Lea, J. G. McGrady, R. E. Thomason and E. T. Edwards, and each of them, go hence without day herein, and recover their costs in this behalf expended; that the prayer of the complainant, Atchison, Topeka & Santa Fe Railway Company, for an injunction herein be, and the same is hereby, in all things, denied and refused, and that the bill of said complainant filed herein should be dismissed; that all costs in this proceeding be taxed against the said complainant, Atchison, Topeka & Santa Fe Railway Company.

To the action of the Court in refusing the relief prayed for in its bill of complaint, and the refusal of the Court to grant the injunction as therein sought, the complainant in open Court duly excepted to the order, judgment and decree herein entered, and gave notice

of appeal to the Honorable Circuit Court of Appeals for the Fifth Circuit.

It is further ordered that forty-five (45) days from and after the entry of this judgment be allowed in which to prepare and file a statement of facts herein, and to otherwise perfect the appeal taken [fol. 85] and to be taken by the complainant herein, and said complainant shall give an appeal bond in the sum of $8,000.00, payable to defendants and conditioned as required by law.

W. R. Smith, Judge.

[File endorsement omitted.]

In the District Court of the United States for the Western District of Texas, El Paso Division

Petition for Appeal and Order Allowing Same—Filed May 3, 1922

[Title omitted]

The above named Complainant, the Atchison, Topeka & Santa Fe Railway Company, conceiving itself aggrieved by the decree and order entered on the 24th day of March, A. D. 1922, in the above entitled proceeding, doth hereby appeal from said decree and order to the United States Circuit Court of Appeals for the Fifth Circuit, and it prays that this, its appeal, may be allowed and that a transcript of the record of the proceedings and papers upon which said decree and order was made and entered, duly authenticated, may be sent to the said the United States Circuit Court of Appeals for the Fifth [fol. 86] Circuit, and as in duty bound will ever pray.

Gardiner Lathrop, J. W. Terry, Wm. H. Burges, A. H. Culwell, Attorneys for Complainant and Appellant, the Atchison, Topeka & Santa Fe Railway Company.

And, now on this the 3d day of May, A. D. 1922 it is ordered that the appeal be allowed as prayed for.

W. R. Smith, Judge.

[File endorsement omitted.]

In the District Court of the United States for the Western District of Texas, El Paso Division

[Title omitted]

Assignments of Error—Filed May 3, 1922

Comes now, the complainant, Atchison, Topeka & Santa Fe Railway Company, and says that in the record and proceeding in the

above styled cause there is manifest error, which it assigns as such as follows.

[fol. 87]

I

The Court erred in refusing to issue the injunction prayed for, and in holding that under the facts, the Complainant was not entitled to relief sought.

II

It appearing that Complainant is a foreign railroad corporation, has no line of railroad within the State of Texas, does not operate any line of railway within that State, and does not conduct its business as a common carrier for hire within that State, it was not subject to the jurisdiction of the District Court of El Paso County, Texas, in the cause of action therein declared upon in the case of Edmund R. Wells against it, and the enforcement of the default judgment therein obtained is and will be a taking of Complainant's property without due process of law, and a denial to it of the equal protection of the law, as guaranteed under the Fourteenth Amendment to the Constitution of the United States, and as against which Complainant was and is entitled to an injunction herein.

III

The service of process by publication in the case of Edmund R. Wells against the Complainant, as well as service therein of citation on the Secretary and Treasurer of Complainant at Topeka, Kansas, did not confer jurisdiction upon the District Court of El Paso County, Texas to hear and determine the cause declared upon.

IV

The service of the writ of garnishment upon the Rio Grande, El Paso & Santa Fe Railway Company in the case of Edmund R. Wells [fol. 88] against Complainant, as filed in the District Court of El Paso County, Texas, did not give to that Court the right nor confer jurisdiction upon said Court to hear and determine the cause of action so declared upon by Wells against the Complainant, and Complainant was entitled to the issuance of the writ of injunction herein, and the Court erred in refusing to issue the same.

V

It appearing that defendant, a foreign railroad corporation, was sued in a State Court of the State of Texas on a cause of action for unliquidated damages arising beyond the limits of said State, and that defendant had not voluntarily entered its appearance in said cause, there was no jurisdiction in the Court to hear and determine the same, and any Statute of the State of Texas which undertakes to confer such jurisdiction by any process, is, as to Complainant and under the facts herein appearing, void and the enforcement of same

would and will be violative of the Fourteenth Amendment to the Constitution of the United States, in that same would and will be a taking of Complainant's property without due process of the law, and a denial to it of the equal protection of the law, and as against which Complainant was and is entitled to an injunction therein, and the Court erred in refusing to issue the same.

VI

Article 247A of the Revised Statutes of the State of Texas does not confer jurisdiction over foreign railroad corporations, and a service of the writ of garnishment herein on the Rio Grande, El Paso & [fol. 89] Santa Fe Railway Company did not confer jurisdiction upon the Courts in Texas over the defendant, Complainant herein, in the suit filed against it in said State Court by Edmund R. Wells, and the issuance and service of said writ of garnishment fixed no lien on any properties of Complainant which could be made the basis of any character of judgment, and no jurisdiction was thereby conferred upon the District Court of El Paso County over Complainant on the cause of action declared upon, and any Statute of the State of Texas which undertakes to confer such authority and give jurisdiction in causes of action of the nature herein complained of is void and the enforcement of a judgment based thereon, under the facts herein appearing, will and would deprive Complainant of its property without due process of law, and will and would be a denial to it of the equal protection of the law as required under the Fourteenth Amendment to the Constitution of the United States, and the judgment entered in the case of Edmund R. Wells against Complainant being therefore void, Complainant was entitled to the relief sought in its bill herein filed, and the Court erred in refusing the same.

VII

Article 247A of the Revised Statutes of the State of Texas is wholly inapplicable to the facts of the case as declared upon Edmund R. Wells in his cause of action filed against Complainant in the District Court of El Paso County, Texas, and to construe the same as authorizing the issuance and service of the writ of garnishment impound- [fol. 90] ing property belonging to Complainant, and thereby fixing jurisdiction against the Complainant would, and will be, contrary to the provisions of the Interstate Commerce Act of 1906 as amended, and the Transportation Act of 1920, and the Legislature of Texas was and is without power to fix jurisdiction on causes of action against a foreign railroad corporation, under the facts as herein appearing, as well as to fix any lien on or against any funds or property belonging to such foreign railroad corporation, and that may be in the possession of a resident of the State of Texas, and to construe said Article of the Texas Statutes as so authorizing would, is and will be contrary to the provisions of the Interstate Commerce Act of 1906 as amended, and Transportation Act of 1920, and the Court erred in not so holding.

VIII

Article 247A of the Revised Statutes of the State of Texas is void and wholly unenforceible, in that additional rights and remedies are therein given against non-residents of the State of Texas to any that may be asserted against residents of said State, and to apply and enforce same against a foreign railroad corporation is and will be a denial to such corporation of the equal protection of the law, and is and will be a taking of its property without due process of law, and same is and will be violative of Section 2, Article 4 of the Constitution of the United States, which requires that citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, and no right is or was conferred upon [fol. 91] the said Edmund R. Wells by Article 247A of the Revised Statutes of the State of Texas which can or may be enforced against Complainant, and the Court erred in not so holding.

IX

The issuance and service of the writ of garnishment on the Rio Grande El Paso & Santa Fe Railway Company in the case of Edmund R. Wells against Complainant conferred no jurisdiction upon the District Court of El Paso County, Texas over Complainant or to hear and determine the cause of action declared upon against it by the said Edmund R. Wells, as the service of said writ of garnishment fixed no lien on the funds or property attempted to be impounded under said writ of garnishment, as no valid judgment had been obtained against Complainant by the plaintiff prior to the issuance of said writ of garnishment, and no property of Complainant was legally impounded under said writ of garnishment so served, and because of which there was no jurisdiction and the judgment entered was void, and as against the enforcement of which Complainant is entitled to an injunction.

X

It appearing that the monies impounded under the writ of garnishment served upon the Rio Grande, El Paso & Santa Fe Railway Company in the cause of action asserted by Edmund R. Wells against Complainant accrued to Complainant in the conduct of its Interstate business as a common carrier, conducted wholly beyond the limits of the State of Texas, and that same would be used by it in [fol. 92] carrying on its transportation business wholly beyond the limits of the State of Texas and as required by law and the regulations of the Interstate Commerce Commission, to withhold the same, or any portion thereof, under and by virtue of the writ of garnishment so served, as well as the judgment entered in the garnishment proceeding, will be and is violative of the Amended Act to regulate commerce, approved May 29th, 1917 as well as the Transportation Act of 1920, and particularly Section 402 thereof, and said funds are not subject to said process of garnishment and no lien became

fixed on or against the same by reason of the service of said writ of garnishment, and the entry of judgment thereon, and because of which no jurisdiction was conferred upon the District Court of El Paso County, Texas over complainant in the cause of action asserted against it by Edmund R. Wells, and the Court erred in not so holding.

XI

It appearing that the engines, cars and other railroad equipment impounded under the writ of garnishment served on the Rio Grande, El Paso & Santa Fe Railway Company were in the possession of Garnishee under a contract with Complainant, giving to said Garnishee the right to the use of said engines, cars and equipment in the conduct of transportation business, same having been delivered to Garnishee by Complainant in due course of business as a common carrier, and that same were needed by Garnishee as well as Complainant in the conduct of such transportation, and that such commerce handled therein was almost exclusively Interstate in character, same [fol. 93] was not subject to the process of garnishment and the attempted impounding thereof under said writ of garnishment did not confer jurisdiction upon the District Court of El Paso County, Texas over Complainant in the cause of action asserted against it by Edmund R. Wells, and the Court erred in not so holding.

XII

To construe the Statutes of the State of Texas as to authorize the seizure by attachment of cars and engines of Complainant while in the possession of Garnishee or to authorize the seizure by writ of garnishment monies due or to become due Complainant by Garnishee of freight and passenger charges for account of Complainant, same having been collected by Garnishee as the delivering transportation line, will interfere with, impede and obstruct Complainant in the performance of the duties imposed upon it by the Act to regulate Commerce, and will interfere with and obstruct the Interstate Commerce Commission in the performance of the duties imposed by said Act, and, said Statutes of the State of Texas so construed will deprive Complainant of its properties and rights without due process of law, as it will not be due process of law when requiring Complainant by the Act to regulate Commerce to permit its cars and engines to run into Texas, and to permit the Garnishee to collect its freight and passenger charges, to require Complainant to submit to the jurisdiction of the State Courts of Texas on causes of action by citizens of other states, originating in such other States, and having [fol. 94] no relation to any traffic or transportation to or from El Paso or to any business or thing therein, and the Court erred in not so holding.

Wherefore, Complainant, Atchison, Topeka & Santa Fe Railway Company prays that the judgment rendered in the District Court of United States for the Western District of Texas, whereby an injunc-

tion was denied to it and all other relief prayed for in its petition was likewise denied, be reversed and any and all other relief given to it which in equity it is entitled.

Gardiner Lathrop, J. W. Terry, Wm. H. Burges, A. H. Culwell, Attorneys for Complainant, Atchison, Topeka & Santa Fe Railway Company.

[File endorsement omitted.]

[fol. 95 & 96] Appeal Bond—Filed May 3, 1922; [for $10,000.00; approved, Smith, J; omitted in printing]

In the District Court of the United States for the Western District of Texas, El Paso Division

[Title omitted]

[fol. 97] In the District Court of the United States for the Western District of Texas, El Paso Division

[Title omitted]

Citation With Waiver of Service—Filed May 3, 1922

The United States of America, ss:

The President of the United States to Edmund R. Wells, Claude B. Hudspeth, George E. Wallace, A. J. Harper, Tom Lea, J. G. McGrady, R. E. Thomason and Eugene T. Edwards, and their attorneys of record, Greeting:

You are hereby cited and admonished to be and appear before the [fol. 98] United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, within thirty (30) days from the date hereof, pursuant to an appeal allowed and filed in the Clerk's office in the District Court of the United States, for the Western District of Texas, El Paso Division, in a cause and proceeding wherein the Atchison, Topeka & Santa Fe Railway Company is complainant, and Edward R. Wells, Claude B. Hudspeth, George E. Wallace, A. J. Harper, Tom Lea, J. G. McGrady, R. E. Thomason and Eugene T. Edwards, are defendants, to show cause, if any there be, why the decree and order rendered in favor of said defendants and against the Atchison, Topeka & Santa Fe Railway Company, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William H. Taft, Chief Justice of the United States, and the seal of said District Court, this the 3d day of May, in the year of our Lord, One thousand nine hundred and twenty-two.

Signed this the 3d day of May, One thousand nine hundred and twenty-two.

W. R. Smith, Judge. Attest: D. H. Hart, Clerk of the United States District Court for the Western District of Texas, By Nan B. Smith. (Seal.)

[fol. 99] The order for appeal having been allowed in the above numbered and entitled cause, and said appeal having been duly perfected, service of citation is hereby accepted and waived, and we here and now enter our appearance as though duly served with copies of citation on appeal.

This 3rd day of May, A. D. 1922.

Lea, McGrady, Thompson & Edwards, J. G. McGrady, Solicitors for Defendants, Edmund R. Wells, Claude B. Hudspeth, George E. Wallace, A. J. Harper, Tom, Lea, J. G. McGrady, R. E. Thomason and Eugene T. Edwards.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PRECIPE FOR TRANSCRIPT—Filed May 3, 1922

May 2nd, 1922.

To the Clerk of the District Court for the Western District of Texas, El Paso Division:

Please make up record for appeal in this case, as follows:
Caption.
Bill of injunction.
Answer of defendants.
Agreement for submission.
Statement of the evidence.
Decree.
Petition for appeal and order allowing same.
[fol. 100] Assignments of error.
Appeal bond.
Citation with waiver of service.
Certificate.

Turney, Burges, Culwell, Holliday & Pollard, Attorneys for Complainant.

[File endorsement omitted.]

CLERK'S CERTIFICATE

I, D. H. Hart, Clerk of the United States District Court in and for the Western District of Texas, hereby certify that the foregoing

on 100 pages, is a true and correct transcript of proceedings had and orders entered in cause No. 129 in equity, styled: The Atchison, Topeka & Santa Fe Railway Company, Complainants, vs. Edmund R. Wells, et al., as the same appear on file and of record in this office and includes the original citation on appeal at page 97, beside copy thereof.

I do further certify that the foregoing record embraces all pleadings, process and orders had in this case including the praecipe filed by the appellant herein.

Witness my official signature and the seal of said District Court, at office in the City of El Paso, Texas, this the 25th day of May, A. D. 1922.

D. H. Hart, Clerk, By Nan B. Smith, Deputy Clerk. (Seal.)

[fol. 101] That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of November 8th, 1922

[Title omitted]

On this day this cause was called, and, after argument by A. H. Culwell, Esq., for Appellant, and J. G. McGrady, Esq., for Appellees, was submitted to the Court.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

[Title omitted]

OPINION OF THE COURT—Filed December 15th, 1922

Appeal from the District Court of the United States for the Western District of Texas

A. H. Culwell (J. W. Terry, William H. Burges and Gardiner Lathrop on the brief), for Appellant.

J. G. McGrady (Wallace & Cameron and Lea, McGrady, Thomason & Edwards on the brief), for Appellee.

Before Walker, Bryan, and King, Circuit Judges.

[fol. 102] BRYAN, *Circuit Judge:*

Edmund R. Wells, a citizen of Colorado, sustained personal injuries in New Mexico, while he was employed by the Atchison, To-

peka & Santa Fe Railway Company, a corporation under the laws of Kansas. Wells brought suit in a State Court of Texas against the railway company, alleging that his injuries were due to its negligence. In Texas the railway company was engaged only in interstate commerce, and was not served with process. In aid of his suit, Wells obtained, first, a writ of attachment, and then a writ of garnishment; and recovered judgment by default, in the sum of $4,000, and thereafter a judgment in the same amount against the garnishee, the Rio Grande, El Paso & Santa Fe Railroad Company.

The present suit is brought by the Atchison, Topeka & Santa Fe Railway Co., Appellant, and original Defendant in the garnishment proceedings, to enjoin Wells and his attorneys, who are the Appellees here, from enforcing the collection of the judgments obtained by Wells.

The Court denied the relief prayed in this suit, and dismissed the bill of complaint.

The issuance of writs of attachment, before judgment, against persons, partnerships, associations or corporations, upon which personal service cannot be obtained, is authorized by statute, even in suits founded in tort or upon demands which are unliquidated. Vernon's Sayle's Tex. Civil Statutes, (1914), Art. 247-a. Writs of garnishment may be issued after an original writ of attachment has been issued. Id. Art. 271.

Appellant contends that the judgment which it seeks to enjoin was in personam; that if that suit was in rem, the judgment against the garnishee is void because the Court was without jurisdiction to enter it until after a valid judgment in personam had been recovered against appellant; and that the statutory provisions of Texas above referred to are void as an interference with interstate commerce.

[fol. 103] The judgment which Wells obtained against the Appellant railway company was not in personam. It does not purport to be, but by its own terms can only be satisfied out of funds impounded by the writ of garnishment. The rule laid down in Pennoyer vs. Neff, 95 U. S. 714, a case so much relied on by Appellant, to the effect that a personal judgment obtained against a non-resident, upon whom no personal service of process was made, is without validity, is clearly recognized by the Courts of Texas. Stewart vs. Anderson, 70 Tex. 588; Studebaker vs. Gorlach, 192 S. W. 545.

It is also established that a judgment in rem only confers jurisdiction to satisfy a plaintiff's demand out of property impounded within the jurisdiction of the Court. Mann vs. Brown, 201 S. W. 438. As already seen, attachment before judgment is authorized by statute in Texas in a suit founded upon tort, and a writ of garnishment may issue at any time after the issuance of a writ of attachment. Under the terms of the statutory provisions, therefore, a writ of garnishment may issue before judgment is obtained. We are of opinion that the State Court acquired jurisdiction to proceed in rem, and to subject the garnisheed funds to the payment of the judgment obtained by Wells against Appellant. Harris vs. Balk, 198 U. S. 215.

The suit brought by Wells was maintainable in a State Court of Texas, although both the Plaintiff and the Defendant were citizens of other States. Atchison, Topeka & Santa Fe Railway Co. vs. Sowers, 213 U. S. 55; Tenn. Coal, etc., Co. vs. George, 233 U. S. 354. The effect upon interstate commerce of garnishment and attachment proceedings, authorized by a State Statute, is too remote to be objectionable. Davis vs. Railway Co., 217 U. S. 157; International Harvester Co. vs. Kentucky, 234 U. S. 579.

The decree is affirmed.

[fol. 104] IN THE U. S. CIRCUIT COURT OF APPEALS

[Title omitted]

JUDGMENT

Extract from the Minutes of December 15th, 1922

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause, be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the Appellant The Atchison, Topeka & Santa Fe Railway Company and the sureties on the appeal bond herein, E. W. Kayser, and F. M. Murchison, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 105] UNITED STATES OF AMERICA:

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

CLERK'S CERTIFICATE

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 101 to 104 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 3886, wherein The Atchison, Topeka & Santa Fe Railway Company, is Appellant, and Edmund R. Wells, et al., are Appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 100 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 24th day of January, A. D. 1923.

Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. [Seal of United States Circuit Court of Appeals, Fifth Circuit.]

[fol. 106] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 3886

[Title omitted]

WRIT OF CERTIORARI AND RETURN—Filed July 19, 1923

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the transcript of the record of the proceedings of this Court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this Court.

In pursuance of the command of the annexed writ of certiorari, I now hereby certify that on the 16th day of July, A. D. 1923, there was filed in my office a stipulation in the above entitled case in the following words, to-wit:

"IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1922

No. 877

[Title omitted]

Come now, the parties by their respective Counsel, and hereby stipulate and agree that the record already on file in the office of the Clerk of the Supreme Court of the United States shall stand as a return to the Certiorari herein granted by the Supreme Court of the [fol. 107] United States, and the Writ thereon issued, directed to the Honorable the Judges of the United States Circuit Court of Ap-

peals for the Fifth Circuit, same dated the 23rd day of June, A. D. 1923.

(Signed) A. H. Culwell, (Signed) Wm. H. Burges, (Signed) J. W. Terry, Attorneys for the Atchison, Topeka & Santa Fe Railway Company. (Signed) J. G. McGrady, (Signed) Geo. E. Wallace, Attorneys for Edmund R. Wells, Tom Lea, R. E. Thomason, J. G. McGrady, Claude B. Hudspeth, Geo. E. Wallace, A. J. Harper, and E. T. Edwards."

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 16th day of July, A. D. 1923.

Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit. [Seal of United States Circuit Court of Appeals, Fifth Circuit.]

[fol. 108] UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Being informed that there is now pending before you a suit in which The Atchison, Topeka & Santa Fe Railway Company is appellant, and Edmund R. Wells et al. are appellees, No. 3886, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Western District of Texas, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Su-[fol. 109] preme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-third day of June, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[fol. 110] [File endorsement omitted.]

[fol. 111] [File endorsement omitted.]

[fol. 112] [File endorsement omitted.]